Ministry of
Consumer and
Commercial
Ontario Relations

REPORT OF THE MINISTER'S ADVISORY COMMITTEE ON THE PERSONAL PROPERTY SECURITY ACT

85-0490/

Office of the
Minister

Ministry of
Consumer and
Commercial
Relations

416/963-0311

555 Yonge Street
Toronto, Ontario
M7A 2H6

June 15, 1984

To All Interested Persons:

Enclosed is a copy of the report of my Advisory Committee on the Personal Property Security Act, dated April, 1984 in which is set out in some detail the proposals of the committee for revisions to the Act the committee considers appropriate at this time in the light of experience gained in this and other jurisdictions since the Act was proclaimed in force April 1, 1976 as well as to accommodate corporation securities and the repeal of the Corporation Securities Registration Act.

I am greatly indebted to Mr. Fred Catzman, Q.C., the chairman of my committee and to the members of the committee, who have devoted a great deal of time and expertise in developing their proposals and in preparing the report. I am sure you will agree the report is very comprehensive and will prove to be a very worthwhile document both now and in the future.

I am making this report available to you because I am anxious to receive your comments by October 1st, indicating your approval of the proposed revisions or offering your constructive comments on changes to the proposals that you consider appropriate.

My officials have reviewed the report and have an additional proposal they wish to make that I would appreciate you also reviewing and commenting if appropriate. The proposal relates to the requirement for a motor vehicle to be described by serial number on line 10 of a financing statement. The present requirement is that the serial number be set out only when the motor vehicle is classified as consumer goods. The proposal is that this requirement be extended to include circumstances when the motor

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vehicle is classified as equipment. The reason for the proposal is that, at the present time, an enquiry by motor vehicle serial number will not disclose a registration in which the vehicle is classified as equipment (unless the secured party has elected to describe the vehicle on line 10 notwithstanding it is not a requirement). The consequence is that a person cannot always rely solely upon a serial number enquiry and should also be placing enquiries in the names of the present and previous owners when appropriate. My Advisory Committee did not accept the proposal of my officials for these reasons, i) it would impose considerable workload (and risk of errors being made) on a financer of a business with a large number of vehicles classified as equipment, e.g., taxi fleet, telephone company, construction company, ii) there is normally a significant turnover of vehicles and the financer would not know of it, iii) the files of such a business could become cluttered with multipage registrations of financing statements as well as financing change statements adding new deliveries and/or recording partial discharges. My officials have tried to meet some of these valid objections by revising their proposal in the following particulars, i) the secured party would be permitted to submit a second page of a registration to set out only the vehicle descriptions (in appropriate format) rather than have to prepare numerous statements and ii) the Act would provide that the secured party would be protected notwithstanding it elected to not describe the vehicles (classified as equipment) by serial number, in the appropriate format, as against unperfected security interests, subsequently perfected security interests and general creditors but not against a buyer. Thus, if a financer is satisfied that the motor vehicles classified as equipment are not a significant portion of the collateral, or is satisfied the debtor will replace any vehicles that are sold, or is satisfied the debtor will not attempt to defraud it by selling off the vehicles, the financer need not set out the description as proposed. The proposed subsection would read as follows:

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30(4) Where a motor vehicle is sold other than in the ordinary course of business of the seller and the motor vehicle is classified as equipment of the seller, the buyer takes it free from any security interest therein given by the seller even though it is perfected by registration unless the vehicle identification number of the motor vehicle is set out in the designated place on the financing statement or on a financing change statement referenced thereto.

May I urge you to carefully consider the above proposal and the proposals of my Advisory Committee and to submit your comments before the deadline of October 1st. Please address your comments to:

Mr. T.M. Rundle
Registrar of Personal Property Security
Ministry of Consumer and Commercial Relations
543 Yonge Street, 4th Floor
Toronto, Ontario
M7A 2J5

Thank you for your consideration.

Robert G. Elgie M.D.
Minister

REPORT OF THE MINISTER'S ADVISORY COMMITTEE ON THE PERSONAL PROPERTY SECURITY ACT PRESENTED TO THE HONOURABLE ROBERT G. ELGIE, M.D. MINISTER OF CONSUMER AND COMMERCIAL RELATIONS IN APRIL, 1984

Ontario
Ministry of Consumer and Commercial Relations
Advisory Committee on the Personal Property Security Act
Suite 308
133 Richmond St West
Toronto, Canada
M5H 2L8

April 18, 1984

The Honourable Robert G. Elgie, M.D.,
Minister of Consumer & Commercial Relations,
555 Yonge Street,
9th Floor,
Toronto, Ontario.
M7A 2H6

Dear Mr. Minister:

I have the honour to submit herewith on behalf of your Advisory Committee its report on the Personal Property Security Act for your consideration.

Yours very truly,

Fred M. Catzman.

FMC:dr
Encl.

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I. INTRODUCTION

The Personal Property Security Act ("the Act") was enacted on June 15, 1967, and proclaimed into force on April 1, 1976.

It had been drafted by a Committee chaired by Fred. M. Catzman, Q.C., and composed of the late Professor Albert S. Abel, Professor Ian F.G. Baxter, the late John Corrigan, Q.C., Donald E. MacKenzie, James G. Torrance, Q.C. and Terence Wardrop, Q.C.

The draft was reviewed by the Ontario Law Reform Commission, which resulted in a number of amendments, including

(1) section 3(1)(c) which made the Act inapplicable "to a mortgage, charge or assignment whose registration is provided for in the Corporation Securities Registration Act"; and

(2) section 47(3) which imposed a time limit of thirty days on registration of a financing statement.

Following proclamation of the Act, the Committee, differently constituted, was appointed as an advisory committee to the Minister of Consumer and Commercial Relations to monitor the operation of the Act and to develop amendments for its improvement. The Committee consisted of Fred. M. Catzman, Q.C. (chairman), Marvin A. Catzman, Q.C., (who acted as secretary until his elevation to the Bench), Bradley Crawford, James F. Heal, Donald E. MacKenzie, and Professors Richard H. McLaren and Jacob S. Ziegel. Thomas M. Rundle, the Registrar under the Act served ex-officio, and Allen Doppelt, the solicitor for the Personal Property Security Branch, is our current secretary.

The work of the Committee focused upon,

(a) a study of Article 9 of the American Uniform Commercial Code (which was substantially amended in 1972) and the jurisprudence thereunder;

(b) a study of the 1982 Uniform Personal Property Security Act, which is a revised version of the Uniform Personal Property Security Act adopted by the Canadian Bar Association in 1970. The 1982 Act was prepared by a committee under the chairmanship of Professor Jacob S. Ziegel and jointly adopted in 1982 by the Canadian Bar Association and the Uniform Law Conference of Canada;

(c) the Manitoba Personal Property Security Act, S.M. 1973, c. P-35 (proclaimed in force September 1, 1978), which was modelled after the Ontario and 1970 Uniform Acts;

(d) the Saskatchewan Personal Property Security Act, S.S. 1979-80, c. P-6.1 (proclaimed in force May 1, 1981), which is substantially the same as the Uniform Personal Property Security Act, 1982;

(e) the jurisprudence under the Ontario Act;

(f) the representations of interested persons;

(g) the constructive criticism and suggestions of the members of the Bar.

The Committee's deliberations are embodied in the Draft Act hereto annexed. It incorporates the resolution of many complex problems, in some instances by a bare majority. The Committee determined as a matter of policy not to include any notation of the reasons of dissenting members in this Report.

The Committee wishes to record its deep appreciation for the diligence and conscientiousness with which Mr. Doppelt discharged his exacting responsibilities and, with the assistance of members of the Committee, prepared the Commentary on the Draft Act. The draftsmanship of the Draft Act owes much to the work of Donald L. Revell, of Legislative Counsel of Ontario, who rendered most valuable assistance to the Committee.

INTRODUCTION

It is not within the scope of this introductory report to consider in detail or even to list all of the amendments recommended by the Committee.

A major recommendation is the repeal of the Corporation Securities Registration Act and the integration of existing registrations under that Act into the P.P.S.A. system.

Since the decision of the Ontario Court of Appeal in *Rogerson Lumber Co.* v. *Four Seasons Chalet Ltd.* (1980), 29 O.R. (2d) 193, 113 D.L.R. (3d) 671, it has been clear that there are important divergencies and conceptual inconsistencies between the Ontario P.P.S.A. and the security provisions of the federal Bank Act. The Committee advised the Honourable Robert G. Elgie, the Minister of Consumer and Commercial Relations, that harmonization of the two statutes would require coordinated action by the Ontario and federal governments and we are pleased to note that negotiations are proceeding to that end.

To give some insight into the range of the Draft Act and the changes it would achieve, attention is drawn to the following significant amendments:

(1) **One registration for a number of security agreements with the same debtor where the collateral is not consumer goods:**
This should minimize redundancy and multiplicity of registrations in the system and facilitate searches.

(2) **A security interest in any collateral may be perfected by registration:**
This rule enables a secured party to protect the priority of his/her security interest in all forms of collateral by means of registration.

(3) **Registration of true consignments and leases for a term of more than one year:**
Registration of financing statements relating to consignments made by merchants and long-term leases by professional lessors, which are not security agreements, will be required to protect the interests of third parties dealing with lessees and consignees who are in possession of goods they do not own.

(4) **Elimination of the 30-day time period for registration and the requirement for a court order permitting late registration:**
This proposal will remove an impediment that adds to the costs of registration and results in the invalidation of registrations on technical grounds.

(5) **Variable registration period (five-year maximum for consumer goods and 75-year maximum for other types of collateral):**
This amendment will enable a registrant to choose a registration period equal to the term of the security agreement and will reduce the need to register renewals or discharges of registrations.

(6) **Mandatory discharge of consumer goods' registrations within 30 days after the debt is repaid or other obligations satisfied:**
This will purge the register of discharged obligations and update the record of consumers.

(7) **Amendments to registrations:**
A registrant will be permitted to correct any error or omission in a registration.

(8) **A security agreement or registration will not be invalidated or ineffective unless it contains an error or omission that is likely to mislead materially a reasonable person:**
The present curative provisions will be replaced by a new curative provision, which will preserve the validity of documents which contain errors or omissions that are unlikely to materially mislead any reasonable person.

(9) **The courts will be given broader powers to make orders directing that a secured party comply or be relieved from compliance with the enforcement provisions of the Act upon default under the security agreement by a debtor:**
Both debtors and secured parties will be in a better position to apply for relief to the courts, which will balance the competing rights and duties of the parties.

(10) **The Assurance Fund provisions will be revised to establish a new administrative procedure for the hearing of claims:**

Claims against the Fund will be more expeditiously resolved.

The following is a detailed summary of the substantive provisions which will amend or supersede the existing law.

II. EXPANDED APPLICATION OF THE ACT

1. Corporation Securities

The original draft of the Personal Property Security Act envisaged complete integration of the law governing security interests in personal property. For reasons which have not been disclosed, the government was persuaded to exempt from the application of the Act "a mortgage, charge or assignment whose registration is provided for in the Corporation Securities Registration Act" (section 3(1)(c)). This provision preserved an overlapping statute which required separate documentation, registration and search and raised difficult questions of priorities. A partial resolution of the problem was effected by an amendment to the P.P.S.A. (see S.O. 1981, c. 2), which in effect allowed secured parties to elect to be governed by the P.P.S.A.

It is now proposed to get rid of this anachronism by eliminating the exemption referred to above. A number of concomitant amendments are proposed to achieve integration and harmonization of the two Acts and to deal with problems inherent in corporate security. The difficult task of achieving an orderly transition is dealt with in detail in sections 78 and 79.

Corporation securities registered under the CSRA will be perfected by registration for a transition period of fifty years and renewable for a further period of seventy-five years.

Section 78 deals with discharges, partial discharges, assignments, amendments, subordination, change of debtor's name and enforcement of the security interest.

Section 60 preserves the traditional remedy of appointing a receiver or receiver-manager. He is subject to the duties of a secured party under Part V (default) and section 17 (duty of reasonable care of the collateral) by virtue of section 60(2), but is relieved of the requirement to give notice of disposition of collateral in the ordinary course of business (section 63(6)(g)). He may be removed or replaced by court order (section 67(1)(e)).

A trustee under a "trust indenture" (defined in section 1.32) is included in the expanded definition of "secured party" (section 1.28). Section 18(2) exempts a trustee under a "trust indenture" from furnishing statements of account as provided in section 18(1)(a), (b) and (c).

2. Consignments

The present Act applies to consignments "intended as security" (section 2(a)(ii)). It was designed to exclude true consignments such as delivery for approval, but to include transactions which notwithstanding their designation as consignments were in fact devices intended as security for payment or performance of an obligation. The Act did not define "consignment".

"Consignment" has been the subject matter of extensive litigation to discern the intention of the parties, a subjective and elusive concept.

The proposal now is to extend the Act to apply to non-security consignments where both parties to the transaction are professionals. "Consignment" is defined in section 1.5. It applies to a transaction between two persons, both of whom in the ordinary course of business deal in goods of the description which is the subject matter of the transaction. It does not include a consignee who is generally known by his creditors to be substantially engaged in selling or leasing goods as a consignee (e.g., a liquidator or auctioneer).

Section 2(1)(b) makes it clear that the Act applies to a consignment, as defined, notwithstanding that it may not secure payment or performance of an obligation. It will thereby catch a true consignment (a contract of sale or return) between a wholesaler and retailer even though it was not intended as security.

The interest of a person who delivers goods under a consignment is now included in an expanded definition of "purchase-money security interest" (section 1.24.IV).

3. **Lease for a Term of More Than One Year**

The Act presently applies to a lease "intended as security" (section 2(a)(ii)).

As in the case of consignments, the subjective element of intention has given rise to considerable litigation. While the Act will continue to apply to a lease that in substance creates a security interest (section 2(1)(a)), it will extend to every lease for a term of one year (section 2(1)(b)) even if it does not in substance create a security interest. The reason, of course, is to require public record to negate ostensible ownership by possession.

"Lease for a term of more than one year" is defined (section 1.17). It applies only where the lessor leases the goods in the ordinary course of business and where the *original* term exceeds one year. It will not apply to a lessor who does not lease in the ordinary course of his business, nor to a lease for a term of one year or less even though there may be options to renew or subsequent renewal agreements. This definition should be read together with section 2(1) of the Draft Act. Therefore a lease for an initial term of one year or less which creates a security interest also falls within the scope of the Act.

For the purposes of determining the amount secured by a lease, the definition of "obligation secured" has been added (section 1.19).

Attention is drawn to section 58(1) which limits the operation of Part V of the Act (rights and remedies on default) to a security interest that secures payment or performance of an obligation and therefore does not extend to consignments or leases which do not secure payment or performance of an obligation.

4. **Security Interests of the Crown and its Agencies**

Section 2(2) makes the Act applicable to the Crown and every agency of the Crown.

5. **Definitions**

The definitions in section 1 have been revised and augmented.

New Definitions

"Account" (section 1.2) - to replace the term "book debt", which has been rendered obsolete by modern computer technology. It covers any monetary obligation except chattel paper, instrument or security.

"Consignment" (section 1.5) - to conform with the new treatment of consignments (see above "consignments").

"Future advances" (section 1.12) - to conform with the substantive provisions of section 33(3) dealing with future advances.

"Lease for a term of more than one year" (section 1.17) to conform with the extension of the application of the Act (see above "Lease for a Term of More Than One Year").

"Money" (section 1.18) - to conform with the special treatment of money in section 22(f) as a separate species of collateral from intangibles. Section 29(b) subordinates a security interest in money to a transferee.

"Obligation secured" (section 1.19) - is defined insofar as it applies to leases.

"Personal property" (section 1.20) ties in with the definition of collateral (section 1.4). It excludes building materials that have been affixed to real property, and by inference, real property.

"Purchase" (section 1.23) and
"Purchaser" (section 1.25) - to point up that it is broader than "buy" and "buyer" which is referred to in section 28.

"Security" (section 1.29) - to replace present definition of "securities" to correspond with the definition in section 53(1)(u) of the Ontario Business Corporations Act, 1982.

"Trust indenture" (section 1.32) - complementary to the inclusion of corporation securities in the Act.

Amended Definitions
"Chattel Paper" (section 1.3) - is amplified to include leases.

"Debtor" (section 1.8) - is amplified to include lessee and consignee.

"Goods" (section 1.13) - to incorporate "personal property" as newly defined in section 1.20.

"Instrument" (section 1.14) - to include letters of credit and advice of credit.

"Intangible" (section 1.15) - to exclude money.

"Inventory" (section 1.16) - to include goods that have been leased.

"Proceeds" (section 1.22) - to clarify that it includes insurance moneys that have been received for lost or stolen collateral.

"Purchase money security interest" (section 1.24) - to include leases for a term of more than one year, and consignments.

"Secured party" (section 1.28) to include a trustee who is the holder of a security interest.

"Security agreement" (section 1.30) - to extend to a document evidencing a security interest.

"Security interest" (section 1.31) - to substitute the collective term "personal property" newly defined in section 1.20 for the specific categories of collateral comprehended therein.

"Value" (section 1.33) - to include an antecedent debt or liability of the debtor (but not of a third party) to the secured party.

Eliminated from the current list of definitions is "Account debtor" because "account" is now defined so that section 39(1) now refers to a person obligated on an account or on chattel paper.

"Judge" (section 1(o) - is deleted. Reference is made to the appropriate courts in the relevant sections of the Draft Act.

"Notify" (section 1(p)) - this definition has been dropped and is superseded by a comprehensive substantive provision which prescribes the mode of giving notice (section 68) and what constitutes notice (section 69).

"Securities" (section 1(w)) - has been replaced by "security".

III. ATTACHMENT

Section 11 has been amended to provide as a condition of attachment that the secured party obtain either

(a) possession of the collateral, or

(b) a security agreement signed by the debtor containing a description of the collateral sufficient to enable it to be identified (section 11(2)(a)).

A security interest is unenforceable against a third party unless it has attached (section 11(1)).

However, section 11 does not render an oral agreement unenforceable against the debtor. It is implicit that a security agreement may be oral by the opening words of section 10 "where a security agreement is in writing".

Present section 12(1)(a) conditions attachment upon when "the parties intend it to attach". This condition has been eliminated and superseded by a provision that a security interest attaches when "the secured party obtains possession of the collateral or when the debtor signs a security agreement that contains a description of the collateral sufficient to enable it to be identified". The section is inapplicable where the parties have agreed to postpone the time for attachment, in which case the security interest attaches at the agreed time.

The words "including a security interest in the nature of a floating charge" have been added to the opening part of section 11(2) to make it clear that the general rules for attachment of a security interest apply to a security interest created in or provided for in a floating charge.

IV. PERFECTION

1. **Perfection by Possession** (Section 22)

The words "or repossession" have been added after "possession" in the first line of present section 24 to make it clear that a security interest can be perfected by repossession of the specified classes of collateral for the purposes of realization. Letters of credit and advices of credit have been deleted as a category of collateral capable of perfection by possession and the definition of "instrument" has been extended to include letters of credit and advices of credit where these documents state on their face that they must be surrendered upon claiming payment thereunder. A security interest in a letter of credit or advice of credit that does not contain this condition will have to be perfected by a means other than possession.

The Committee has recommended that "money" be added to section 24 as a class of collateral that can be perfected by possession (see the new definition of "money" in section 1(18) of the Draft Act). When a debtor pledges money rather than pays it, the secured party will have perfected by possession and will not lose priority for failing to comply with present section 25 which would require registration as money falls within the definition of an "intangible".

2. **Perfection by Registration** (Section 23)

Under sections 24 and 25 of the present Act, instruments, securities, letters of credit and advices of credit may only be perfected by possession. This section is revised to permit a secured party to perfect by registration a security interest in every type of collateral (section 23). This amendment will facilitate the integration of corporation securities into the Act. Many corporate bonds, debentures and trust indentures cover all the assets of the corporation. It should be noted that this section will not preclude a secured party from perfecting by possession in those cases permitted by the Act.

3. **Perfection as to Proceeds** (Section 25)

Under section 27(2) of the present Act, a secured party has a perfected security interest in proceeds so long as a financing statement has been properly registered with respect to the original collateral and the security interest in the original collateral was perfected when the proceeds were created. This policy is clarified and preserved by the provisions of sections 25(2) and (3). A perfected security interest in the original collateral automatically extends to every type of proceeds.

If the security interest in the original collateral was perfected otherwise than by registration (e.g., by possession), a further step is required to maintain the perfected status of the security interest in the proceeds. In these circumstances subsection (3) provides that there is a ten-day period of temporary perfection which commences on the day after the debtor obtains possession of the collateral. If the secured party fails to perfect the security interest in the proceeds by the end of the ten-day period by any method permitted by the Act, the security interest will become unperfected. The subsection refers to obtaining possession of the proceeds rather than the receipt of proceeds (the present wording of section 27(2)) to ensure that the provisions will apply to uncertificated securities. Reference should also be made to section 33(5), which clarifies that for the purposes of the general priority rule in section 33 the date for registration or perfection as to collateral is also the date for registration or perfection as to proceeds.

4. **Temporary Perfection** (Section 24)

The type of collateral which may be temporarily perfected under the circumstances specified in subsection (2) has been expanded to include securities as well as instruments. The amendment will enable a secured party to relinquish possession of share certificates to a debtor for a limited time period for the purpose of making an exchange of securities related to a take-over bid (section 24).

5. **Perfecting as to Goods Held by a Bailee** (Section 26)

Computer technology has created uncertified securities, i.e., securities which are evidenced only by an entry in the records of a central depository for securities. Accordingly, present

section 28(2) has been amended by changing the collateral to which the section applies from "goods" to "collateral" and replacing the term "bailee", which connotes physical possession of tangible property by one person for another, with the word "person". The subsection will apply to security interests in any type of collateral, including intangible property such as uncertificated securities, which by virtue of section 85(4) of the OBCA, 1982 are deemed to be in the "possession" of any person other than a bailee who has issued a negotiable document of title. For example, the section could cover the situation where one bank has arranged the entry in the records of a clearing corporation of a pledge of uncertificated securities for both itself and another bank which has a secondary position as a subordinate secured party of the common debtor. The making of the entry will perfect the security interest of the subordinate secured party.

6. **Future Advances** (Sections 1.12, 13 and 33(3))

Future advances under a perfected security interest enjoy the same priority as the first advance (section 33(3)). However, unless the secured party has bound himself to make the advance, the security interest for future advances will be subordinate to the rights of a secured creditor or execution creditor who has given notice of his interest. Future advance is defined in section 1.12.

By reason of this definition, present section 15 of the Act has been considerably shortened (section 13 of the Draft Act).

V. PRIORITY OVER PERFECTED SECURITY INTEREST

1. **Buyers and Purchasers in the Ordinary Course of Business** (Section 28)

Subsection (1) substitutes the word "buyer" for "purchaser". The terms "purchase" and "purchaser" have been defined very broadly in sections 1.23 and 1.25 to include numerous consensual transactions, including the taking of a security interest, by which a person obtains an interest in personal property. The protection of subsection (1) will not be extended to persons who acquire an interest otherwise than as a "buyer".

Subsection (2) deals with lessees from a lessor who leases goods in the ordinary course of business.

Subsection (3) has been amended by the substitution of the phrase "by registration" for "under section 25".

Subsection (4) confers upon a purchaser of an instrument, negotiable document or security, priority over any other security interest in the collateral perfected by registration or temporarily perfected under section 23 or section 24 if the following three conditions are satisfied:

(1) the purchaser gave value;

(2) without notice of the security interest; and

(3) took possession of the collateral.

2. **Bona Fide Purchaser of Negotiable Instruments** (Section 29)

Subsection (1) has been amended by the addition of clause (b), which provides that the rights of a transferee from the debtor of money are to be determined without regard to the Act. This amendment is complementary to the amendment to section 23, which permits a secured party to perfect a security interest in any collateral. Clause 1(b) should prevent a court from holding that registration of a financing statement is notice of a security interest in money to persons who acquire the money by way of payment. The rights of such persons will be resolved by the common law.

The reference in present section 31(1) to negotiable documents and securities is deleted and has been dealt with in new section 28.

VI. PRIORITIES

1. **General Rule**

Present section 35 has been amplified and revised. The first secured party to register takes priority when all competing security interests have been perfected by registration. When at least one competing security interest has not been perfected by registration, the first secured party to perfect his security interest prevails. The proposed second rule in section 33(1) of the Draft Act provides that the secured party who perfects his security interest by registration will have priority over a competing security interest perfected by possession even though its perfection is later in time.

2. **Priorities - Rental Payments and Mortgage Payments** (Section 36)

This section, which was added in 1981, is substantially the same as section 36a of the present Act. There is some uncertainty as to whether the wording of subsection (1) will protect a mortgagee of land who has taken an assignment of rents as collateral security against a subsequent assignee of the rental payments who registers notice of his interest in the proper land registry office after the mortgage is registered. It is open to question whether the mortgagee "has acquired for value the lessor's interest in the lease" and whether registration of the mortgage constitutes registration of the lessor's interest or notice thereof. The standard form of mortgage gives a mortgagee a right of attornment of rents upon default when the mortgagee enters into possession of the land. The words "or in the real property thereby demised" have been added to the subsection to clarify that a mortgagee who enters into possession and attorns for rents after default under the mortgage will have priority as a result of the prior registration of the mortgage over an assignee of rental payments.

Subsection (2) deals with a priority dispute between an assignee of the right to payment under a mortgage or charge and a person who acquires the mortgagee's or chargee's interest in the mortgage or charge (e.g., by assignment of the mortgage). The words "for value" have been added after the phrase "the interest of a person who acquires". These words were inadvertently omitted from the subsection when it was enacted in 1981. The intention is to confer priority only on prior purchasers for value of the mortgagee's or chargee's interest in the mortgage or charge. A transfer of the interest without consideration will not suffice to attain priority.

3. **Priorities - Fixtures** (Section 34)

Subsections 36(1) and (2) of the present Act set out rules to determine priority between interests in real property and a security interest in fixtures. These priority rules have been consolidated into one subsection without major policy or drafting changes.

Clause 36(3)(b) of the present Act subordinates security interest in fixtures to the interest of a subsequent execution creditor where a notice of security interest is not registered in the proper land registry office. This rule is deleted because the interest of an execution creditor, like the interest of the creditors represented by the trustee in bankruptcy, should have priority over a security interest only if there has not been perfection by registration in compliance with the provisions of Part IV of the Act. Subsection (2) has also been amended by changing the words "actual notice" to "knowledge" because the term "notice" has been removed from the Act. Clause 2(a) does not refer to a subsequent mortgagee because a mortgagee is included in the expanded definition of "purchaser" in s. 1(25).

Subsection (3) provides for a right of removal of the fixtures from the real property upon default under the security agreement. Subsection (4) provides for security for damages caused by the removal. It should be noted that s. 67(1) makes provision for a summary application to a court to resolve fixture priority disputes, including any issues related to removal of the goods affixed to the real property, reimbursement for damage caused by removal and the amount of the deposit as security for the cost of the damage.

Subsections (5), (6) and (7) prescribe an obligation to give a notice of intention to remove goods affixed to the real property (and the contents of the notice) in order to enable persons with subordinate interests in the real property to exercise their right to retain the collateral pursuant to subsection (7).

4. **Special Priority of Security Interest in Crops** (Section 32(1))

As a result of representations made by suppliers of seed and fertilizers, present section 34 has been revised.

Subsection (1) deals with the special priority of a perfected security interest in crops or their proceeds over an earlier perfected security interest to the extent that the obligations secured by the earlier security interest were due for a six-month period prior to the time the crops began growing. The intention of the rule is to facilitate the financing of the current year's crop. The Committee was informed that it is common practice for farmers to purchase seed grain and other agricultural inputs necessary to produce the crops in the late autumn in preparation for spring planting. Since the security interest is often given more than three months before the growing season commences, the secured party is not entitled to the protection afforded by present section 34(1). The amended section extends the priority to perfected security interests given up to six months before the crops become growing crops to reflect the practices of farmers and agricultural suppliers. More than one perfected security interest may be given priority under subsection (1). In these circumstances, subsection (2) provides that the security interests rank pro rata according to the ratio that the amount advanced by each bears to the total amount advanced.

5. **Special Priority of Purchase-Money Security Interests in Inventory** (Section 32(3))

Subsection (3) (section 34(2) of the present Act) sets out a special priority rule for purchase-money security interests in inventory or its proceeds. The words "given by the same debtor" have been added to the opening part of the subsection to clarify that the rule is concerned only with disputes involving a common debtor. Clause 3(b), which imposes a notice requirement as a precondition for priority, has been revised. The purchase-money inventory financer will no longer be obligated to give notice of his interest to a secured party whose security interest was actually known to him. This is consistent with the general policy of disregarding actual knowledge as a factor in the resolution of priority disputes. Even if the purchase-money inventory financer did not notify a person with a security interest which was actually known but unperfected, he would still rank ahead of that person under section 20(1)(a) by virtue of the fact he had perfected his security interest.

6. **Special Priority of Purchase-Money Security Interests in Non-Inventory Collateral** (Section 32(4))

Subsection (4) (subsection 34(3) of the present Act) provides a special priority rule for a non-inventory purchase-money security interest or its proceeds "given by the same debtor".

7. **Priorities Between Competing Purchase-Money Security Interests** (Section 32(5))

A purchase-money security interest as defined in section 1.24 may be taken by a seller to secure the unpaid purchase price or by a financer who advances money to the debtor to apply on account of the purchase price.

Section 32(5) accords priority to the purchase-money security interest of the seller over that of the financer.

8. **Priority of Unperfected Security Interests** (Section 20)

This section deals with the priority of unperfected security interests and other interests in collateral. Subclause 1(a)(i) clarifies that an unperfected security interest is subordinate to a perfected security interest in the same collateral. This fundamental principle which is implicit in the present Act is now explicitly set out in the priority rules. Some statutes merely create a lien while other statutes go further and assign a priority to the lien. To resolve any uncertainty as to the position of such statutory liens, subclause 1(a)(i) provides that in both circumstances the lienholder has priority over an unperfected security interest.

Subclause 1(a)(ii), as worded at present, accords priority to an execution creditor only where he acts without knowledge of the unperfected security interest and before its perfection. The references to knowledge and the time of perfection have been deleted. The execution creditor is protected because he puts effort and expense into obtaining judgment and proceeding to

execute. The secured party who neglects to perfect his security interest will not be able to prejudice the rights of the execution creditor by simply notifying him of the existence of the security interest. Subclause (1)(a)(ii) specifies the various legal processes by which a judgment creditor may assume control of the collateral. The purpose of the amendment is to clarify that distress and self-help are excluded as means of assuming control of collateral and thereby to achieve priority over an unperfected security interest. It was not the intention of the Act that a particular creditor who assumes control of collateral should, by reason of present section 69, escape his obligation to share rateably with other creditors under the Creditors' Relief Act. Subclause 1(a)(iii) will make it clear that the scheme of the Creditors' Relief Act takes priority over the rights of the individual seizing creditor.

The language of subclause 1(a)(iii) of the present section 22 refers to "the interest of a person... who represents the creditors of the debtor", but since such persons do not have an interest distinct from the interests of those whom they represent (e.g., a trustee in bankruptcy), the provision has been deleted from subclause 1(a)(iii) and stands alone as clause 1(b). Instead of stating that the unperfected security interest is subordinate to the interest of the creditors' representatives, it is rendered "not effective" against him. The new wording accords with the language in s. 9, which speaks of the "effectiveness" of a security interest. A complementary change of wording has been made to subsection (3).

Present subclause 1(b) of the Act has been divided into two separate subclauses – 1(c) and 1(d). Clause 1(c) deals with the priority of a transferee of chattel paper, documents of title, securities, instruments or goods who acquires an interest other than a security interest. The qualification that the transferee (buyer) prevails only to the extent of the new value he gives has been deleted in order to eliminate the possibility that a transferee could be obliged to give up the collateral upon repayment of his investment.

Clause 1(d) provides a priority rule for the transferee of an interest in intangibles other than accounts. A transferee of accounts has been excluded from the class of protected transferees. His priority will be determined under the provisions of section 33 because all transferees of accounts are treated under the Act as secured parties.

Present subsection (2) has been amended by the removal of any reference to the knowledge of the represented creditors. This class of unsecured creditors is in a position similar to that of the judgment creditor under subclause 1(a)(ii). The dilatory secured party with an unperfected security interest will not be permitted to prejudice the rights of the unsecured creditors represented by a trustee in bankruptcy by merely notifying them of the existence of the security interest. See the case of *Re Bellini Manufacturing & Importing Ltd.* (1981), 37 C.B.R. (N.S.) 209 (Ont. C.A.). The "relation back" concept embodied in section 50(4) of the Bankruptcy Act is retained. The trustee in bankruptcy's status has effect from the date of filing of the petition for a receiving order in the case of an involuntary bankruptcy.

A purchase-money security interest in intangible collateral (which is not capable of possession) must be perfected by registration within ten days after attachment in order to attain priority over the interest of execution creditors and be effective against the trustee in bankruptcy (subsection 3).

Subsection (4), a new provision, is intended to prevent a secured party from unfairly obtaining priority over unsecured creditors while the debtor is insolvent. The security interest will be deemed to be unperfected if the secured party delays perfection (by either registration or possession) for more than thirty days after attachment and until shortly before the date of bankruptcy (i.e., perfection occurs within thirty days prior to that date). The subsection provides an additional incentive to encourage secured parties to register promptly.

Subsection (4) is introduced to counteract dilatory perfection which could result from the removal of time limits for registration in present section 47(3). The principle that the race is to the swift will probably encourage prompt registration to allow priority over subsequent registrants. It will not, however, avail unsecured creditors. The imposition of a time limit for registration was urged by the Ontario Law Reform Commission to avoid the possibility of a secured party withholding public notice of his security agreement from unsecured creditors who might extend credit on the basis of the register. As a quid pro quo for the elimination of time limits for registration under subsection (4), a security interest will be deemed unperfected where the security interest attached more than sixty days before the bankruptcy of the debtor but was perfected less than thirty days before that date.

VII. MISCELLANEOUS

1. **Curative Provisions** (Section 4)

The present Act contains two separate curative provisions

(1) section 47(5) which covers financing statements and financing change statements; and

(2) section 4 which covers security agreements.

The tests are different. The Act preserves validity in the case of:

(1) an *error* of a clerical nature or in an immaterial or non-essential part of a financing statement or financing change statement that *has not misled* (section 47);

(2) a *defect, irregularity, omission, or error* therein or *in the execution thereof,* unless in the opinion of the court it is shown to have actually misled some person whose interests are affected by the document (section 4).

These sections have now been consolidated into section 4.

The uniform test to invalidate a document by reason only of a defect, irregularity, omission or error therein or in the execution or registration thereof is that it is *likely to mislead materially a reasonable person.*

2. **Service of Notices** (Section 68) (New)

A number of provisions of the present Act require that a notice be given or served in certain circumstances (e.g., sections 20(1), 55(3) and 59(5)). Section 68 includes comprehensive rules governing the service of notices. Subsection (1) deals with the service of a notice:

(a) on a secured party who has registered a financing statement or financing change statement; and

(b) on a debtor by a secured party.

Subsection (2) specifies the means by which service may be effected on other persons not covered by subsection (1). Subsection (3) governs service on persons located outside of Ontario but carrying on business in the province. Subsection (4) deems service by registered mail to be effected upon actual receipt of the notice or the expiry of six days after the day of registration, whichever is the earlier. This rule will be particularly important for the purpose of determining the fifteen-day period of notice of disposition under section 63(4).

Section 69 is complementary. It prescribes how and when a person, firm and corporation has notice or is notified.

3. **Extension or Abridgement of Time** (Section 70)

This section replaces section 64 of the present Act. A court is given the power ex parte to extend or abridge the time requirements in the Act, except where third parties have vested interests.

VIII. REGISTRATION - PART IV

1. **Registration of Financing Statement** (Section 45)

The original concept of notice filing was to substitute registration of a financing statement for registration of a security agreement. It was the view of the Committee that the Act should be amended to prevent the computer file from being filled with numerous identical registrations between the same parties. The notice filing system should be broadened so that one registration should be sufficient to cover one or more security agreements between the parties where a security interest is given in the same type of collateral, even though the terms of the agreements differ.

Accordingly, subsection (1) has been amended by the deletion of the words "that is created in or provided for in a security agreement". It provides simply for the perfection of a security interest by the registration under the Act of a financing statement.

Subsections (2) and (3) deal with the time within which the registration of a financing statement may take place. A registration relating to consumer goods may not be made before execution of the security agreement. It should be noted that no longer will registration be required to be made within thirty days after execution of the security agreement as provided in present section 47(3). Except in the case of consumer goods, a financing statement may be registered at any time before or after the execution of a security agreement.

Subsection (4), a new subsection, states that one registration may perfect one or more security interests created or provided for in one or more security agreements between the parties except where the collateral is consumer goods.

2. **Classification of Collateral** (Section 46(3))

Subsection 46(3) addresses the collateral description set out in a financing statement or financing change statement. If a secured party sets out a classification of collateral together with words that appear to limit the scope of the classification he may claim a perfected security interest only in the class as limited unless otherwise indicated on the statement. An exception has been made in the case of proceeds. The underlying policy is that a person making searches should be able to rely on the information recorded in the registration system. This will entitle a searcher interested in equipment to ignore a financing statement that classifies the collateral as inventory.

3. **Assignments** (Section 47)

Present section 49(1) has been expanded to permit the recording of a partial assignment by a secured party.

4. **Transfer of Collateral** (Section 48)

To resolve any doubt as to whether a registration is mandatory when a debtor transfers its interest in only part of the collateral, subsections (1) and (2) require that transfers of all or part of the collateral be recorded on a financing change statement with the sanction that the security interest in the transferred collateral will become unperfected on the expiry of the fifteen-day period.

A series of unauthorized transfers may occur before the secured party acquires knowledge of the transfer by the debtor. Only persons dealing with the last transferee need to be protected and it is often difficult to obtain information on intermediate transferees. Subsection (3) provides that a secured party is obliged to record in the registration system only information relating to the last or current transferee who has possession of the collateral.

Subsection (4) provides that a security interest that becomes unperfected under subsections (1) and (2) (due to failure to record a change of debtor name or transfer by debtor within the relevant fifteen-day period) may thereafter be perfected by registering a financing change statement as long as the registration of the financing statement or any renewal thereof is still

effective. Although the security interest may become reperfected under section 48(4), there may still be a loss of priority pursuant to present section 53(1)(d) but only to persons who acquired rights in the collateral by an act or thing done during the period of unperfection. Subsection 53(1)(d) has been deleted in order to place an additional onus on secured parties to keep the information in the registration system up-to-date. A reperfected security interest will not longer be back-dated to the date of the original registration.

5. **Amendments** (Section 49)

Present section 50 has been criticized as unduly limiting the type of amendments that may be recorded on a financing change statement. Only errors or omissions of a clerical nature in a financing statement or financing change statement are permitted to be corrected on an amendment statement. Jurisprudence has cast doubt as to whether a substitution of collateral could be recorded as an amendment to a security agreement and the term "amendment" has been narrowly construed. New section 49, which provides for the registration of amendments, is broader in scope than present section 50. All defects, irregularities, errors or omissions may be corrected. If the recording of a change in information contained in a financing statement or financing change statement is not provided for elsewhere in Part IV it may be recorded by registering a financing change statement under this section.

6. **Registration Periods** (Section 51)

This section provides for the replacement of the present fixed three-year registration period with a variable registration period. The registration of a financing statement will be effective until the end of the expiration date set out in the financing statement. Many security agreements are now in force for longer than three years. The registration system should be flexible enough to accommodate a registration period that subsists for a term equal to the original term of the security agreement. One advantage of the variable registration period is that a secured party will not be required to register renewal or discharge statements if he chooses an appropriate expiration date. Computer systems have been adapted to allow a secured party to select any expiration date.

The maximum length of a registration period is seventy-five years except for consumer goods registrations where the maximum period is five years. The creation of a variable registration period with these maximum time periods is considered to be practical and preferable to a perpetual registration period.

7. **Renewal** (Section 52)

If the variable registration period is adopted, there may still be circumstances in which it will become necessary to renew a registration. The secured party may have chosen too early an expiration date or the parties may later agree to extend the original term of the security agreement. Accordingly, section 52 provides that renewal of a registration or reperfection of a security interest is permitted at any time before or after the expiration of the registration period.

8. **Effect of Registration** (Section 53)

The doctrine that registration of a financing statement constitutes notice of the security interest (present section 53(1)(a)) and of a financing change statement (s. 53(1)(e)) is deleted. The registration of a financing statement or financing change statement will no longer constitute notice of the security interest. The general rule under section 33 is that priority between competing security interests is based on the order of registration or perfection and that prior actual notice or knowledge of a competing claim is not relevant to the determination of priorities. The references to notice in present sections 47(4) and 49(2) of the Act have been deleted from the corresponding sections of the Draft Act.

Section 53 is now limited to defining the effective period of registration of a financing statement and a financing change statement. A financing change statement under section 52 (renewal) extends the registration until the end of the expiration period set out in the financing change statement (a five-year maximum period where the collateral is consumer goods; seventy-five years for other collateral). Any other financing change statement is effective during the remainder of the period for which the registration of the financing statement to which it refers is effective.

The special priority rules in present section 53(1)(c) and (d) of the Act governing late renewals, transfers by debtors and changes of debtor names have been deleted in order to place a greater onus on secured parties to register the required financing change statement as soon as possible, to ensure that the information in the registration system is up-to-date.

IX. DEFAULT - PART V

1. **Application** (Section 58)

Section 58(1) provides that Part V will not apply to pure leases and consignments and absolute transfers of accounts and chattel paper. It is not appropriate that Part V, which governs default proceedings taken by a secured party against a debtor, apply to these non-security transactions.

2. **Surplus and Deficiency of Proceeds Arising From Disposition of Collateral** (Section 64)

Section 64 deals with the distribution of the proceeds of disposition in excess of those required to satisfy the security interest and expenses of the disposition. It replaces sections 59(1)(c), 59(2) and 60 of the present Act. The parties entitled to the surplus proceeds are the same parties who are entitled to receive a notice of disposition under section 63(4). The concluding words of subsection (1) preserve the priority of the persons referred to in clauses 1(a), (b) and (c) among themselves. An application may be made to a court pursuant to section 67(1)(c) to determine any priority question before payment of the surplus.

Subsection (2) permits a secured party to require claimants to the surplus to submit proof of their interest within ten days after a demand is made and to relieve the secured party of the obligation to pay the claimant in the absence of proof.

Subsection (3) expressly confirms that the debtor remains liable for any deficiency after disposition of the collateral unless the security agreement or any legislation provides an exemption.

3. **Retention of Collateral Upon Default** (Section 65)

Section 65(2) provides that in the case of collateral other than consumer goods notice of intention to retain the collateral in satisfaction of the obligation secured shall be given by the secured party to the persons entitled to a notice of disposition under section 63(4).

Subsection 61(3) of the present Act has been amplified into four subsections (subsections 65(3) - (7)). Subsection (3) deals with an objection by a person entitled to notice and a consequent mandatory sale in accordance with section 63. An objection may be made only by a person whose interest in the collateral would be adversely affected by the secured party's proposal to retain the collateral. The time within which an objection may be made has been extended from fifteen to sixty days to protect the interest of subordinate secured parties and general creditors.

Subsection (4), which is similar to the wording of section 64(2), is a new provision entitling a secured party to require proof of the interest of the objector. Subsection (5) gives a judge of the District Court express power to relieve against an unreasonable objection to a secured party retaining the collateral. Subsection (6) sets out the effect of retention of collateral without effective objection upon the expiry of the 60-day period. Subsection (7) provides express protection for a bona fide purchaser for value from a secured party who has retained collateral, even if the requirements of the Act have not been complied with by the secured party. This would provide a parallel protection to that enjoyed by a purchaser under sections 63(8) and (9) where a disposition has been made under that section.

4. **Redemption of Collateral** (Section 66)

Subsection (1), which deals with redemption of collateral, is derived from section 62 of the present Act. Instead of enumerating the parties entitled to exercise the right of redemption, the section states that any person entitled to receive a notice of disposition under section 63(4) may redeem the collateral. The reference to the reasonable expenses of the secured party has been considerably shortened by the use of a cross-reference to clause 63(1)(a). Where more than one person elects to redeem the collateral, the priority of their rights to redeem will be the same as the priority of their respective interests under the Act.

Subsection (2) is a new provision. It allows a consumer debtor to reinstate the security agreement after default by paying the sum actually in arrear and the reasonable expenses incurred by the secured party. Subsection (3) limits the right to reinstatement to not more than once during the term of the agreement unless the District Court orders otherwise. This provision is intended to relieve consumers from defaulting in their obligations under the security agreement by occasional or minor breaches of the agreement.

5. **Remedies for Failure of Secured Party to Comply with Part V** (Section 67)

Subsection 63(1) of the present Act contains limited rights of application to a court for an order directing compliance with section 19 or Part V, and in particular it does not contemplate an application being made by a secured party. Subsection (1) confers much broader powers on the courts and permits applications by a secured party. For example, an order may be made under clause 1(a) directing compliance with the fixture and accession provisions, upon a disposition after default and are more appropriately dealt with under this subsection than under the substantive sections (34 and 35). Clause 1(c) empowers a court to settle questions of priority or entitlement in or to the collateral or its proceeds. Clause 1(d) gives a court a new power to relieve parties from compliance with Part V and sections 17, 34(3) and 35(4). Clause 1(f) permits a court to order the removal or replacement of a receiver or receiver-manager who has been guilty of misconduct prejudicial to persons with an interest in the collateral.

Subsection (2) permits a person to recover compensation for financial loss resulting from a breach of a duty or obligation imposed by Part V, and sections 17, 34(3) and 35(4). Subsection (3) renders void any clause in the security agreement which purports to exclude these statutory duties or obligations imposed upon a secured party or to exclude or limit liability for non-compliance with them.

X. CONSUMER PROTECTION

Consideration was given to the deletion in whole or in part from the Act of special provisions relating to consumer protection. It was concluded that these provisions should be retained in the Act at least until the Consumer Protection Act is amended to incorporate them. Attention is drawn to the following provisions in the Draft Act dealing with consumer protection:

(a) subsection 5(2) (a consumer buyer of goods brought into Ontario from another jurisdiction takes title free and clear of a foreign security interest in the goods where no financing statement has been registered in Ontario),

(b) subsection 25(4) (the requirement to record a motor vehicle identification number where a motor vehicle classified as consumer goods is traded in for another such vehicle),

(c) sections 51(2)(a), 53(2)(a) and 54(2) (a five-year maximum registration period for consumer goods registrations),

(d) subsection 57(1) (the mandatory registration or delivery of a discharge to a debtor where the collateral is consumer goods),

(e) subsection 66(2) (the right of a consumer debtor to reinstate a security agreement), and

(f) subsection 67(2) (the right of a consumer debtor to recover damages where the secured party does not comply with Part V of the Act).

XI. OTHER AMENDMENTS

Attention is also drawn to the following sections which are more fully dealt with in the Commentary:

(a) sections 5 to 8 (conflict of laws),

(b) section 16 (provision to accelerate),

(c) section 18 (statement of account),

(d) section 27 (goods returned or repossessed),

(e) section 30 (priority of liens for materials and services),

(f) section 35 (accessions, priorities),

(g) section 39 (debtors obligated on an account or chattel paper),

(h) section 43 (registrar's certificate),

(i) section 44 (assurance fund),

(j) section 54 (registration of notice of security interest in land registry office),

(k) section 55 (registration of discharge and partial discharge),

(l) section 56 (compulsory delivery of discharge),

(m) section 63 (secured party's right to dispose of collateral upon default), and

(n) sections 75 to 82 (transitional provisions).

DRAFT PERSONAL PROPERTY SECURITY ACT

Interpretation **1.** In this Act,

1. "accessions" means goods that are installed in or affixed to other goods;
2. "account" means any monetary obligation not evidenced by chattel paper, an instrument or a security, whether or not it has been earned by performance;
3. "chattel paper" means one or more than one writing that evidences both a monetary obligation and a security interest in or lease of specific goods;
4. "collateral" means personal property that is subject to a security interest;
5. "consignment" means a transaction under which goods are, for the purpose of sale, resale or lease, delivered by a person,
   i. who, in the ordinary course of business, deals in goods of that description, and
   ii. who reserves title to the goods,

   to a person who in the ordinary course of business deals in goods of that description but does not include a transaction under which goods are delivered to a person for sale, resale or lease if the person is generally known by the person's creditors to be substantially engaged in selling or leasing goods as a consignee;
6. "consumer goods" means goods that are used or acquired for use primarily for personal, family or household purposes;
7. "creditor" includes an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver, and an executor, administrator or committee;
8. "debtor" means a person who owes payment or other performance of the obligation secured, whether or not the person owns or has rights in the collateral, and includes,
   i. a person who receives goods from another person under a consignment,
   ii. a lessee under a lease,
   iii. an assignor of an account or chattel paper, or
   iv. a transferee of or successor to a debtor's interest in collateral;
9. "default" means the failure to pay or otherwise perform the obligation secured when due or the occurrence of any event whereupon under the terms of the security agreement the security becomes enforceable;
10. "document of title" means any writing that purports to be issued by or addressed to a bailee and purports to cover such goods in the bailee's possession as are identified or fungible portions of an identified mass, and that in the ordinary course of business is treated as establishing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers;
11. "equipment" means goods that are not inventory or consumer goods;
12. "future advance" means the advance of money, credit or other value by a secured party pursuant to the terms of a security agreement whether or not such advance is given pursuant to commitment;
13. "goods" means tangible personal property other than chattel paper, documents of title, instruments, money and securities, and includes fixtures, growing crops, the unborn young of animals, timber to be cut, and minerals and hydrocarbons to be extracted and goods are either consumer goods, equipment or inventory;

14. "instrument" means,

R.S.C. 1970, c.B-5

   i. a bill, note or cheque within the meaning of the *Bills of Exchange Act* (Canada) or any other writing that evidences a right to the payment of money and is of a type that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment, or

   ii. a letter of credit and an advice of credit if the letter or advice states that it must be surrendered upon claiming payment thereunder,

   but does not include a writing that constitutes part of chattel paper, a document of title or a security;

15. "intangible" means all personal property, including choses in action, that is not goods, chattel paper, documents of title, instruments, money or securities;

16. "inventory" means goods that are held by a person for sale or lease or that have been leased or that are to be furnished or have been furnished under a contract of service, or that are raw materials, work in process or materials used or consumed in a business or profession;

17. "lease for a term of more than one year" means a lease of goods that has an original term of more than one year where the lessor leases the goods in the ordinary course of business;

18. "money" means a medium of exchange authorized by the Parliament of Canada as part of the currency of Canada or adopted by a foreign government as part of its currency;

19. "obligation secured", for the purposes of determining the amount payable under a lease, means the amount contracted to be paid as rent under the lease and all other amounts that have or may become payable under the lease whether to obtain full ownership of the collateral or otherwise as of the relevant date, less any amounts paid;

20. "personal property" means chattel paper, documents of title, goods, instruments, intangibles, money and securities and includes fixtures but does not include building materials that have been affixed to real property;

21. "prescribed" means prescribed by the regulations;

22. "proceeds" means identifiable or traceable personal property in any form derived directly or indirectly from any dealing with collateral or the proceeds therefrom, and includes any payment representing indemnity or compensation for loss of or damage to the collateral or proceeds therefrom;

23. "purchase" includes taking by sale, lease, negotiation, mortgage, pledge, lien, gift or any other consensual transaction creating an interest in personal property;

24. "purchase-money security interest" means,

   i. a security interest taken or reserved in collateral to secure payment of all or part of its price,

   ii. a security interest taken by a person who gives value for the purpose of enabling the debtor to acquire rights in or to collateral to the extent that the value is applied to acquire the rights,

   iii. the interest of a lessor of goods under a lease for a term or more than one year, or

   iv. the interest of a person who delivers goods under a consignment;

25. "purchaser" means a person who takes by purchase;

26. "registrar" means the registrar of personal property security;

27. "regulations" means the regulations made under this Act;

28. "secured party" means a person who holds a security interest for the person's own benefit or for the benefit of any other person and includes a trustee where the holders of obligations issued, guaranteed or provided for under a security agreement are represented by a trustee as the holder of the security interest;

29. "security" means a document that is,
    i. issued in bearer, order or registered form,
    ii. of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment,
    iii. one of a class or series or by its terms is divisible into a class or series of documents, and
    iv. evidence of a share, participation or other interest in property or in an enterprise or is evidence of an obligation of the issuer;

30. "security agreement" means an agreement that creates or provides for a security interest and includes a document evidencing a security interest;

31. "security interest" means an interest in personal property that secures payment or performance of an obligation, and includes, whether or not the interest secures payment or performance of an obligation,
    i. the interest of a transferee of an account or chattel paper,
    ii. the interest of a lessor under a lease for a term of more than one year, and
    iii. the interest of a person who delivers goods under a consignment;

32. "trust indenture" means any security agreement by the terms of which a body corporate, with or without share capital and wherever or however incorporated,
    i. issues or guarantees debt obligations or provides for the issue or guarantee of debt obligations, and
    ii. appoints a person as trustee for the holders of the debt obligations so issued, guaranteed or provided for;

33. "value" means any consideration sufficient to support a simple contract and includes an antecedent debt or liability of the debtor to the secured party. R.S.O. 1980, c. 375, s.1, *amended.*

COMMENTARY

Paragraph 2

1. *The term "book debt" has been replaced in the Draft Act by the more modern term "account". "Book Debt" is an archaic term which does not reflect modern business practices in which debts are recorded by the use of computer technology. The definition of "account" is identical to s. 1(a.1) of the Uniform Act. It encompasses far more than book debts in that it covers any monetary obligation whether or not it is kept in a book of account. In contrast, the definition in the Uniform Commercial Code is intentionally restricted to a right to payment for goods sold or leased or for services rendered. The new definition in the Draft Act encompasses assignments of debts relating to industrial property (royalties and patents).*

2. *A complementary amendment has been made to s. 2(b), which will make the Draft Act applicable to absolute transfers of accounts (those which do not secure payment or performance of an obligation) instead of absolute assignments of book debts. The effect of the amendment is that the scope of the legislation has been extended to cover the absolute transfer of non-book debt accounts. The definition of "account debtor" in s. 1(b) of the present Act has been deleted. See the commentary on s. 39.*

SECTION 1

Paragraph 3

The definition of "chattel paper" has been expanded to include a lease of specific goods. A similar provision is found in s. 1(c) of the Uniform Act and s. 9-105(1)(b) of the Uniform Commercial Code. A lessor as debtor may assign a lease agreement as collateral for a loan. The amendment would not affect the relationship between the lessor and the lessee.

Paragraph 4

A minor amendment has been made to the definition of "collateral". The word "personal" has been added before the word "property" to conform with the wording of the corresponding definition in s.1(c.1) of the Uniform Act. See the new definition of "personal property" in s. 1(20) of the Draft Act.

Paragraph 5

The definition of "consignment" is new. It is required because s. 2(1)(b) of the Draft Act extends the application of the Act to consignments that do not secure payment or performance of an obligation ("true consignments"). The main part of the definition is based on s. 1(d) of the Uniform Act and applies only to professional consignors and consignees. For example, it is customary in various trades for manufacturers and wholesalers to delivery goods to a retailer for the purpose of sale by the retailer to consumers or for the purpose of purchase by the retailer for its own account with the right to return such goods prior to sale or purchase. See **Re Stephanian's Persian Carpets Ltd.** *(1930), 31 C.B.R. (N.S.) 196 (oriental rugs) and* **Re Toyerama** *(1980), 34 C.B.R. (N.S.) 153 (a consignment agreement relating to the marketing of toys). An exception is provided in the case where goods are delivered to a person for sale, resale or lease if the person is generally known by his creditors to hold goods as a consignee (e.g., a liquidator or auction house). It would be burdensome and superfluous to require registration in these circumstances. This exception is derived from s. 2-326(3)(b) of the Uniform Commercial Code.*

Paragraph 8

The definition of "debtor" has been expanded to reflect the fact that additional categories of persons are now subject to the Act. A consignee, lessee and assignor of an account or chattel paper are mentioned in clauses (i) to (iii) because s. 2(1)(b) of the Draft Act makes the Act applicable to transactions involving these parties. While the present Ontario definition refers only to a transfer of the debtor's interest in collateral with the consent of the secured party, the definition in the Draft Act, in conformity with s. 1(f) of the Uniform Act, applies to any transferee of or successor to a debtor's interest in the collateral.

Paragraph 12

The definition of "future advances" is new. It is substantially the same as the definition in s. 1(i) of the Uniform Act, although part of its wording is taken from s. 15 of the present Act. The definition is important because the Draft Act deals with the priority position of future advances more comprehensively than does the present Act (see ss. 33(3) and (4)).

Paragraph 13

The definition of "goods" has been amended to conform more closely with the wording of s. 1(i.1) of the Uniform Act. The Committee is of the view that the revised definition is clearer and uses more modern terminology. The definition differs from the Uniform Act definition in that it specifically excludes chattel paper, instruments, documents of title and securities which would otherwise fall within the definition because they are "tangible personal property".

Paragraph 14

The definition of "instrument" has been extended to cover letters of credit and advices of credit where these documents state on their face that they must be surrendered upon claiming payment thereunder. The usual procedure of a secured party extending credit on the security of a letter of credit is to perfect a security interest in the letter of credit by taking possession of the document. The issuing bank is then notified. The present law is uncertain concerning rights in letters of credit as collateral. The amendment provides a mechanism to make more certain the procedure to perfect a security interest in a letter of credit which contains the special condition concerning surrender. As a result of the deletion of s. 24(e) of the present Act, a letter of credit or advice of credit that does **not** *state that it must be surrendered upon claiming payment thereunder will have to be perfected by a means other than possession.*

SECTION 1

Paragraph 15

The definition of "intangible" specifically excludes "money", which is treated as a separate category of collateral. See the commentary on the definition of "money" in s. 1(18) of the Draft Act.

Paragraph 16

The words "or have been leased" have been added after the words "for sale or lease" in the second line of the definition of "inventory" to make it clear that goods for lease retain their inventory quality even after they have been leased.

Paragraph 17

This definition is needed because s. 2(1)(b) of the Draft Act makes the Act applicable to a lease of goods for a term of more than one year although the lease does not secure payment or performance of an obligation. Leases of short duration and those made by non-professional lessors are excluded from the scope of the definition. For example, the definition will not catch a lease with an initial term of nine months and a renewal option of two years. However, it should be noted that if a lease is in fact a security agreement drafting it to have a short initial term and a lengthy renewal period will not relieve it from the application of the Draft Act. See also the commentary on s. 2 for the rationale for this amendment.

Paragraph 18

The Draft Act clarifies that money is a separate class of property (e.g., see s. 29 and the related commentary). To the extent that money may be collateral under the present Act it would come within the definition of an intangible. This new definition is based on s. 1(1) of the Uniform Act.

Paragraph 19

The new definition of "obligation secured" is based on s. 1(aa) of the Saskatchewan PPSA. Some concern has been expressed about the difficulty of determining the obligation secured by a lease that is deemed to secure payment or performance of an obligation. The definition sets out a formula to assist secured parties to ascertain the correct amount payable under the lease.

Paragraph 20

The definition of "personal property" is new. It has been added to the Draft Act because the definitions of "proceeds" and "goods" refer to "personal property". Similarly, the definitions of "security interest" and "collateral" have been improved by including a reference to the term.

Paragraph 22

In the interests of achieving uniformity with s. 1(n) of the Uniform Act, the opening part of the definition of "proceeds" has been amended to refer to identifiable and traceable personal property. This limitation on the scope of the definition is now found in the last clause of s. 27(2) of the present Act. The reference to "fixtures" has been deleted because fixtures are included in the definition of personal property. The definition has been amended to clarify that it covers insurance monies received for collateral that is lost, damaged or stolen. The definition differs from the Uniform Act definition in that it does not include any express reference to payments made to discharge or redeem an intangible, chattel paper, instrument or security.

Paragraphs 23 and 25

The definitions of "purchase" and "purchaser" are new. They are based on ss. 1(o) and (q) of the Uniform Act. The words "discount", "issue" and "reissue" contained in the Uniform Act have been omitted from the definition of "purchase" because they are unnecessary. The Draft Act, like the Uniform Act, makes a distinction between a purchaser and a buyer. In equity "purchaser" traditionally has had a broader meaning than "buyer". The former term applies to secured parties (mortgagees and pledgees) as well as outright transferees of the interest in question. The distinction between the two terms is important for the purposes of a number of priority rules in the Draft Act (e.g., s. 28).

SECTION 1

Paragraph 24

The definition of "purchase-money security interest" has been expanded to include the interest of a lessor of goods under a lease for a term of more than one year and the interest of a consignee. The definition is substantially the same as s. 1(p) of the Uniform Act. The revised definition will result in consignors and lessors having the benefit of the special priority rules applicable to purchase-money security interests.

Paragraph 28

The definition of "secured party" has been amended to reflect the fact (inter alia) that trust indentures formerly registered under the Corporation Securities Registration Act now come within the ambit of the Draft Act. The amendment makes it clear that the secured party is the trustee or other person who holds the security interest for the benefit of the holders of obligations issued, guaranteed or provided for under a security agreement. See also s. 60 of the Draft Act, which clarifies the status of receivers and receiver-managers under the Act.

Paragraph 29

The Committee was of the view that the present definition of "security" should be replaced by a more detailed version which corresponds to the definition in s. 53(1)(u) of the new Ontario Business Corporations Act, 1982 (OBCA). It should be noted that there is no reference to any specific category of issuers of securities as there is in the OBCA.

Paragraph 30

The words "and includes a document evidencing a security interest" have been added to the definition of "security agreement". The purpose of the amendment is to ensure that "security agreement" includes a document such as a trust indenture, which may not be a security agreement as defined by the present Act in that it may not itself create or provide for a security interest. Clause 1(v) of the Uniform Act is similarly worded.

Paragraph 31

The definition of "security interest" has been expanded due to the inclusion of consignments and all leases for a term of more than one year in the Draft Act even though they do not secure payment or performance of an obligation (see the corresponding amendment to the definition of "purchase-money security interest" in s. 1(23) of the Draft Act). The opening flush of the definition has been improved by replacing the long enumeration of types of collateral with the term "personal property". Clause (i) refers to a "transferee" rather than an "assignee" of an account or chattel paper to be consistent with the wording of ss. 2(b) and 20 of the Draft Act.

Paragraph 32

The definition of "trust indenture" is new, and is identical to the definition in s. 1(y) of the Uniform Act. Clause 2(1)(a) of the Draft Act expressly provides that the Act applies to trust indentures. See also the reference to trustees under trust indentures in s. 18(2) of the Draft Act.

Paragraph 33

The definition of "value" has been extended to include an antecedent debt or liability owing to the secured party. There is a similar definition in s. 1(z) of the Uniform Act, s. 1-201(44) of the Uniform Commercial Code and s. 53(1) of the Bills of Exchange Act. This amendment clarifies that an antecedent debt or liability is sufficient value whether or not it amounts to sufficient consideration to satisfy the general law of contracts. Past value frequently constitutes the consideration for a security agreement. This definition provides that the antecedent debt must be a debt of the debtor and not a debt of a third party. This restriction has been added in the interest of uniformity with the definition in the Bills of Exchange Act, which has been judicially interpreted to have this meaning. The definitions in the Uniform Act and Uniform Commercial Code do not contain this restriction.

SECTION 2

PART I

GENERAL

Application of Act

2. (1) Subject to subsection 3(1), this Act applies to,

(a) every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest including, without limiting the foregoing, a chattel mortgage, conditional sale, equipment trust, floating charge, pledge, trust indenture, trust receipt, assignment, lease and consignment; and

(b) a transfer of an account or chattel paper, a lease of goods for a term of more than one year and a consignment notwithstanding that the transfer, lease or consignment may not secure payment or performance of an obligation. R.S.O. 1980, c. 375, s 2,*amended*.

Application to Crown

(2) This Act applies to the Crown and every agency of the Crown. *New*.

COMMENTARY

The important changes made in this section are the following:

1. *The Committee recommends the repeal of the Corporation Securities Registration Act and the deletion of s. 3(1)(c) of the present Ontario Act (see s. 84 of the Draft Act). This will resolve the difficulties for the practitioner in having to determine whether a particular document constitutes a bond or debenture for the purposes of the CSRA, or whether it is a security agreement falling within the PPSA. Accordingly, the general language of this section will make the Act applicable to all security interests in personal property, including those security interests created in mortgages, charges or assignments which would have been registrable under the CSRA.*

2. *Clause 2(a) of the present Act provides that the Act applies to a lease or consignment intended as security. The Committee recommends that the scope of the Act be extended to all leases for a term of more than one year and to consignments that do not secure payment or performance of an obligation. See the definitions of "lease for a term of more than one year" and "consignment" in ss. 1(5) and (17) and the related commentaries. The Act will continue to apply to leases for a term of less than one year that secure payment or performance of an obligation. A similar provision is included in the Uniform and Saskatchewan Acts. The rationale for this amendment is that leases and consignments are similar to security agreements in that they put a person, who is not the owner of property, in possession and thus create a potential for the deception of innocent third parties who deal with the lessee or consignee in the belief that no one else has a claim or interest in the property. It is often difficult to distinguish between a true consignment and lease and a lease and consignment that secures payment or performance of an obligation.*

3. *The section has been redrafted to clarify its wording. The words "intended as security" in s. 2(a)(ii) of the present Act were originally included to indicate that the Act applied to assignments, leases and consignments that were in effect security agreements. The Committee is of the view that these words should be deleted because they may be wrongly construed to impose a subjective test to determine the characterization of an agreement in contrast to the objective substance test found in the opening part of clause (a) ("that in substance creates a security interest"). See* **Re Ontario Equipment (1976) Limited** *(1981), 33 O.R. (2d) 648 and comment in 6 C.B.L.J. 113. Subclauses (i) and (ii) of clause (a) have been consolidated. Clause (a) differs from clause (b) in that the latter clause only applies to agreements that do not secure payment or performance of an obligation.*

4. *Subsection (2) is a new provision. Its purpose is to ensure that the status of the Crown under this Act will be the same as every other secured party or debtor. The same provision appears in the Uniform Act and in the Saskatchewan Act. It appears to the Committee particularly anomalous that the Crown, as a secured party, should be exempt from the perfection requirements under the present Act, to the detriment and prejudice of third parties who may not be aware of the Crown's secret lien.*

Non-application of Act

3. (1) This Act does not apply,

(a) to a lien given by statute or rule of law, except as provided in subclause 20(1)(a)(i) or section 30;

(b) to a transfer of an interest or claim in or under any policy of insurance or contract of annuity;

R.S.O. 1980, c. 372

(c) to a transaction under the *Pawnbrokers Act;*

(d) to the creation or assignment of an interest in real property, including a mortgage, charge or lease of real property, other than,

(i) an interest in a fixture, or

(ii) an assignment of a right to payment under a mortgage, charge or lease where the assignment does not convey or transfer the assignor's interest in the real property;

R.S.O. 1980, c. 33

(e) to an assignment for the general benefit of creditors to which the *Assignments and Preferences Act* applies;

R.S.O. 1980, c. 52

(f) to a sale of accounts or chattel paper as part of a transaction to which the *Bulk Sales Act* applies;

(g) to an assignment of accounts made solely to facilitate the collection of accounts for the assignor; or

(h) to an assignment of an unearned right to payment to an assignee who is to perform the assignor's obligations under the contract. R.S.O. 1980, c.375, s.3(1); 1981,c.58,s.1,*amended.*

Rights under R.S.O. 1980, c. 462 not affected

(2) The rights of buyers and sellers under subsection 20(2) and sections 39, 40, 41 and 43 of the *Sale of Goods Act* are not affected by this Act. R.S.O. 1980,c.375,s.3(2).

COMMENTARY

This section limits the ambit of the Act by excluding certain types of transactions. Four clauses have been added to subsection (1):

1. *Clause (e) has been moved from s. 2(b) as it is the view of the Committee that it is more appropriate to include this provision in s. 3 rather than s. 2.*
2. *Where the Bulk Sales Act applies to a sale of accounts or chattel paper, third parties are adequately protected and an additional registration under the PPSA is unnecessary. Therefore clause (f) excludes such sales.*
3. *The exception in clause (g) relates only to collection agencies. Where a person assigns accounts solely to facilitate the collection of accounts, the assignment has nothing to do with a commercial financing arrangement and no third party will be prejudiced by the assignment.*
4. *Clause (h) is based on s. 9-104(f) of the Uniform Commercial Code. An assignment of an unearned right to payment under a contract is excluded from the Act if the assignee is also required to perform the assignor's duties under the contract. This type of assignment does not require registration because only the assignee can perform the obligations under the contract and thus no third party will be affected by the transaction.*
5. *Clause 3(1)(c) of the present Act has been deleted as a complementary amendment to the repeal of the Corporation Securities Registration Act pursuant to s. 84 of the Draft Act.*

Errors in documents

4. A document to which this Act applies is not invalidated nor is its effect impaired by reason only of a defect, irregularity, omission or error therein or in the execution or registration thereof unless the defect, irregularity, omission or error is likely to mislead materially a reasonable person. R.S.O. 1980, c. 375,ss.4,47(5), *amended.*

COMMENTARY

1. *The present Act contains two separate curative provisions. Subsection 47(5) covers errors made in the completion of a registered financing statement or financing change statement. Section 4, as construed by the courts, is limited to errors in a security agreement. See especially* ***Re Robert Sist Development Corp. Ltd.*** *(1977), 17 O.R. (2d) 305, 80 D.L.R. (3d) 444 and* ***Re Ovens (Quick)*** *(1979), 26 O.R. (2d) 468, 103 D.L.R. (3d) 352 (C.A.)*

2. *The tests under the two sections are different. Subsection 47(5) results in invalidity in two cases. A financing statement or financing change statement will not be validly registered if there is a non-clerical error in an essential or material part of the form even though no one has been misled. An error of a clerical nature or an error in an immaterial or non-essential part of the form will result in invalidity if any person has been misled. Section 4 results in a security agreement being invalid or ineffective if the defect, irregularity, omission or error in the agreement or in its execution is shown to have actually misled some person whose interests are affected by the document.*

3. *The two curative provisions have been consolidated into s. 4 of the Draft Act. The Committee is of the opinion that the present tests are difficult to apply and make some artificial distinctions. It is often difficult to determine whether an error is clerical in nature or whether a particular part of the form is an essential or material part. There should be one rule applicable to all documents to which the Act applies. The new uniform test will invalidate a document by reason only of a defect, irregularity, omission or error therein or in the execution or registration thereof which is likely to mislead materially a reasonable person. A small error in a secured party's or debtor's address is an example of an error that would be unlikely to mislead a reasonable person in a material way. On the other hand, a small error in the debtor's name that would result in a registration not being reported in an enquiry would likely mislead a reasonable person. This section uses language similar to s. 66 of the Saskatchewan and Uniform Acts except that the latter two Acts refer to errors or omissions that are seriously misleading.*

Conflict of laws, location of collateral

5. (1) Except as otherwise provided in this Act, the validity, perfection and effect of perfection or non-perfection of,

(a) a security interest in goods; and

(b) a possessory security interest in a security, an instrument, a negotiable document of title, money and chattel paper,

shall be governed by the law of the jurisdiction where the collateral is situated at the time the security interest attaches.

Perfection of security interest continued

(2) A security interest in goods perfected under the law of the jurisdiction in which the goods are situated at the time the security interest attaches but before the goods are brought into Ontario continues perfected in Ontario if it is perfected in Ontario,

(a) within sixty days after the goods are brought into Ontario;

(b) within fifteen days after the day the secured party receives notice that the goods have been brought into Ontario; or

(c) prior to the date that perfection ceases under the law of the jurisdiction in which the goods were situated at the time the security interest attached,

whichever is earliest, but if the goods are consumer goods, the security interest is subordinate to the interest of a buyer or lessee of those goods who acquires the goods as consumer goods without knowledge of the security interest and before the security interest is perfected in Ontario.

Perfection otherwise

(3) A security interest that is not perfected in Ontario as provided in subsection (2) may thereafter be perfected under this Act.

Perfection in Ontario

(4) Where a security interest mentioned in subsection (1) is not perfected under the law of the jurisdiction in which the collateral was situated at the

time the security interest attached and before being brought into Ontario, the security interest may be perfected under this Act.

Revendication

(5) Where goods brought into Ontario are subject to an unpaid seller's right to revendicate or to resume possession of the goods under the law of the Province of Quebec or any other jurisdiction, the right becomes unenforceable in Ontario twenty days after the goods are brought into Ontario unless the seller registers a financing statement or repossesses the goods within that twenty-day period. *New.*

COMMENTARY

1. *The Committee recommends that the conflict of laws rules be completely revised in order to achieve uniformity with the Uniform Act. This section is substantially based on s. 4 of the Uniform Act. Subsection (1) establishes the general principle that the law of the jurisdiction where the collateral is situated at the time of attachment of the security interest shall govern the validity, perfection and effect of perfection or non-perfection of a security interest in goods and fixtures and a possessory security interest in a security, instrument, negotiable document of title, money and chattel paper (the lex situs test).*

2. *The wording of the subsection differs from s. 4(1) of the Uniform Act. The word "possessory" is included in s. 5(1)(b) because s. 7(1)(b) sets out another choice of law rule which applies where the specified types of collateral are perfected by non-possessory means.*

3. *Subsection (2) deals with the movement of goods into Ontario and is a revised version of s. 7 of the present Act. It envisages non-possessory security interests in goods. Clause (c) contains a new rule and is concerned with the situation where perfection may cease under the law of the prior jurisdiction (e.g., where the registration has lapsed). The concluding part of the subsection provides for a consumer goods exception to the temporary perfection created by the subsection. It should be noted that the exception only applies where the security interest is not perfected in Ontario at the time of the subsequent transfer. A buyer or lessee of consumer goods will have priority over a secured party if he or she acquires the goods without knowledge of the security interest and before the security interest is perfected in Ontario. The buyer or lessee will be protected even if he or she does not buy directly from the debtor. For example, a foreign debtor may move into Ontario and wrongfully sell to a dealer who in turn sells to a consumer. In such circumstances it is the Committee's view that the foreign secured party is in a better position to absorb the loss through insurance, etc., than a consumer.*

4. *Subsection (3) is virtually the same as s. 7(3) of the present Act. It permits a secured party to perfect its security interest in Ontario even though it has not done so in accordance with subsection (2) (i.e., the security interest has become unperfected in Ontario).*

5. *Subsection (4), which is the counterpart of s. 8 of the present Act, allows perfection of a security interest in goods moved into Ontario where the security interest was not perfected under the law of the prior jurisdiction.*

6. *Recognition of a seller's right of revendication is accorded under s. 6(2) of the present Act and s. 4(5) of the Uniform Act. The latter provision refers to the law of Quebec "or any other jurisdiction". This wording reflects the fact that a number of civil law jurisdictions other than Quebec also provide for a seller's right of revendication. Subsection (5) is almost identical to s. 4(5) of the Uniform Act.*

Goods brought into province

6. (1) Subject to section 7, if the parties to a security agreement creating a security interest in goods in one jurisdiction understand at the time the security interest attaches that the goods will be kept in another jurisdiction, and the goods are removed to that other jurisdiction, for purposes other than transportation through the other jurisdiction, within

thirty days after the security interest attached, the validity, perfection and effect of perfection or non-perfection of the security interest shall be governed by the law of the other jurisdiction.

Perfection in province

(2) If the other jurisdiction mentioned in subsection (1) is not Ontario, and the goods are later brought into Ontario, the security interest in the goods is deemed to be one to which subsection 5(2) applies if it was perfected under the law of the jurisdiction to which the goods were removed. *New.*

COMMENTARY

1. *Subsection (1), which is based on s. 5(1) of the Uniform Act and s. 9-103(1)(c) of the Uniform Commercial Code, deals with goods intended at the time of attachment of the security interest to be taken to and kept in another jurisdiction. The rule is a qualification to the lex situs rule set out in s. 5(1) of the Draft Act and states that the law of the jurisdiction of destination governs the validity, perfection and effect of perfection or non-perfection of the security interest. The goods must be removed to the other jurisdiction within thirty days after attachment of the security interest.*

2. *Subsection (2) is concerned with the situation where goods are moved into a second jurisdiction within thirty days after the security interest attaches and then later moved into Ontario. For example the goods could, i) be located in Saskatchewan at the time of attachment, ii) then be moved to Manitoba fifteen days later and the security interest perfected under Manitoba law, and iii) be moved to Ontario six months later. Under s. 5(2) of the Draft Act there would be no temporary perfection because the security interest was perfected under the law of Manitoba (the jurisdiction to which the goods were removed) rather than the law of Saskatchewan (the jurisdiction in which the goods were situated at the time of attachment). The effect of the subsection is that the secured party will be entitled to the period of temporary perfection under s. 5(2) as long as the security interest was perfected under Manitoba law.*

Conflict of laws, location of debtor

7. (1) The validity, perfection and effect of perfection or non-perfection,

(a) of a security interest in,

(i) an intangible, or

(ii) goods that are of a type that are normally used in more than one jurisdiction, if the goods are equipment or inventory leased or held for lease by a debtor to others; and

(b) of a non-possessory security interest in a security, an instrument, a negotiable document of title, money and chattel paper,

shall be governed by the law of the jurisdiction where the debtor is located at the time the security interest attaches. *New.*

Change of location

(2) If a debtor changes location to another jurisdiction, a perfected security interest referred to in subsection (1) continues perfected if it is perfected in the new jurisdiction,

(a) within sixty days from the day the debtor changes location;

(b) within fifteen days from the day the secured party receives notice that the debtor has changed location; or

(c) prior to the day that perfection ceases under the law of the first jurisdiction,

whichever is the earliest.

Perfection in Ontario

(3) If the jurisdiction in which a debtor is located does not provide for public registration or recording of security interests mentioned in subsection (1) and the collateral is not in the possession of the secured party, the security interest may be perfected by registration in Ontario.

Idem

(4) A security interest that is not perfected as provided in subsection (2) may be otherwise perfected under this Act.

Location of debtor

(5) For the purpose of this section, a debtor shall be deemed to be located at the debtor's place of business if there is one, at the debtor's principal, registered or head office if there is more than one place of business, and otherwise at the debtor's place of residence. *New.*

COMMENTARY

1. *Clause 6(1)(a) of the Uniform Act, which provides a choice of law rule for intangibles and mobile goods, is the equivalent of s. 5(1) of the present Ontario Act. Subsection 7(1) is virtually identical to s. 6(1) of the Uniform Act. The purpose of this provision is to prescribe a rule based on the location of the debtor at the time of attachment of the security interest in contrast to the present "chief place of business" test. The new rule applies to non-possessory security interests in a security, instrument, negotiable document of title, money and chattel paper.*

2. *Subsection (2) is the counterpart of s. 5(2) of the Draft Act and deals with the rules for continuity of perfection of a security interest where there has been a change in the debtor's location (see the commentary on s. 5(2)).*

3. *Subsection (3), a remedial provision, is the equivalent of s. 5(3) of the present Act. If there is no registration requirement for the security interests mentioned in subsection (1) under the law of the jurisdiction in which the debtor is located, the secured party is permitted to perfect its security interest by registration in Ontario.*

4. *Subsection (4) is the counterpart of s. 5(3) of the Draft Act and allows the secured party to perfect its security interest in Ontario although it has not done so in accordance with subsection (2).*

5. *Subsection (5) creates new rules to ascertain the location of a debtor for the purposes of the section. The subsection is identical to s. 6(2) of the Uniform Act and substantially the same as s. 9-103(3)(d) of the Uniform Commercial Code.*

Procedural and substantive issues

8. (1) Notwithstanding sections 5, 6 and 7,

(a) procedural matters affecting the enforcement of the right of a secured party in respect of collateral other than intangibles are governed by the law of the jurisdiction in which the collateral is located at the time of the exercise of those rights;

(b) procedural matters affecting the enforcement of the rights of a secured party against intangibles are governed by the law of the forum; and

(c) substantive matters affecting the enforcement of the rights of a secured party against collateral are governed by the proper law of the contract between the secured party and the debtor.

Deemed perfection

(2) For the purposes of this Part, a security interest shall be deemed to be perfected under the law of the jurisdiction in which the goods are situated at the time the security interest attaches but before the goods are brought into Ontario when the secured party has complied with the law of the jurisdiction with respect to the creation and continuance of a security interest that is enforceable against the debtor and third parties. *New.*

COMMENTARY

1. *Subsection (1), which is based on s. 7 of the Uniform Act, is intended to clarify the choice of law rules which govern the secured party's enforcement rights against collateral. A distinction is made between procedural and substantive matters. Under clause (a) the lex situs at the time of the enforcement proceedings determines the procedural rules in respect of collateral other than intangibles. Clause (b) provides that the law of the forum governs the procedure for enforcement of security interests in intangibles. Under clause (c) the proper law of the contract between the secured party and the debtor determines the substantive rules affecting enforcement of the secured party's rights.*

2. *Subsection (2) clarifies that a foreign security interest, for the purpose of the conflict of laws rules in Part I of the Draft Act, will be deemed to be perfected under its governing law even though that law has no registration or other perfection requirements. The deemed perfection exists where the secured party has complied with the law of the foreign jurisdiction with respect to the creation and continuance of a security interest that is enforceable against the debtor and third parties. For example, a motor vehicle located in the Province of Quebec may be sold under a conditional sale contract to a Quebec resident, who later moves the motor vehicle into Ontario. Quebec has no registration requirement for conditional sales agreements. It is at present unclear whether the security interest created by the Quebec conditional sale contract is to be deemed "perfected" for the purposes of the PPSA. See the case of* ***Re Bedard*** *(1983), 46 C.B.R. (N.S.) 172.*

PART II

VALIDITY OF SECURITY AGREEMENTS AND RIGHTS OF PARTIES

Effectiveness of security agreement

9. Except as otherwise provided by this or any other Act, a security agreement is effective according to its terms between the parties to it and against third parties. R.S.O. 1980, c.375,s.9.

COMMENTARY

This section has not been amended.

Delivery of copy of agreement

10. Where a security agreement is in writing, the secured party shall deliver a copy of the security agreement to the debtor within ten days after the execution thereof, and, if the secured party fails to do so after a request by the debtor, the District Court, on the application of the debtor, may order the delivery of such a copy to the debtor. R.S.O. 1980,c.375,s.11,*amended.*

COMMENTARY

This section is derived from s. 11 of the present Act. The wording of the opening part of the section has been revised. The phrase "where the security agreement is in writing" should rebut any suggestion that the Act is limited to written security agreements.

Attachment required

11. (1) A security interest is not enforceable against a third party unless it has attached.

When security interest attaches

(2) A security interest, including a security interest in the nature of a floating charge, attaches when,

(a) the secured party or a person on behalf of the secured party other than the debtor or the debtor's agent obtains possession of the collateral or when the debtor signs a security agreement that contains a description of the collateral sufficient to enable it to be identified;

(b) value is given; and

(c) the debtor has rights in the collateral,

unless the parties have agreed to postpone the time for attachment, in which case the security interest attaches at the agreed time. R.S.O.1980,c.375,ss.10,12(1),*amended.*

Idem

(3) For the purpose of subsection (2), the debtor has no rights in,

(a) crops until they become growing crops;

(b) fish until they are caught;

(c) the young of animals until they are conceived;

(d) minerals or hydrocarbons until they are extracted; or

(e) timber until it is cut. R.S.O.1980,c.375,s.12(2),*amended.*

COMMENTARY

1. *This section is a consolidated version of ss. 10 and 12 of the present Act and is based on s. 9-203(1) of the Uniform Commercial Code. It is currently possible to have a perfected security interest pursuant to ss. 12 and 21, although the security interest may be*

unenforceable because of non-compliance with the writing requirements. The Committee is of the view that a single set of requirements should apply to both attachment and enforceability. Accordingly, subsection (1) provides that a security interest is not enforceable against third parties unless it has attached.

2. *Subsection (2) states the three conditions that must be satisfied in order for attachment to occur. Clause 2(a) is based on s. 10 of the present Act and provides that either the secured party must obtain possession of the collateral or the debtor must sign a security agreement containing the required collateral description. None of the other Canadian Acts has required the related land to be identified in describing certain types of collateral, including fixtures, as does s. 10(b) of the present Act. For the purposes of clarification and uniformity, this requirement has been deleted and the words "sufficient to enable it to be identified" have been added after the words "description of collateral". The identical wording is found in the Uniform, Manitoba and Saskatchewan Acts.*

3. *The phrase "the parties intend it to attach" in s. 12(1)(a) of the present Act has been deleted because it gives no guidance as to how the intention of the parties is to be discovered. Security agreements sometimes fail to make it clear when the parties intend the security interest to attach. The concluding words of subsection (2) make it clear that attachment of a security interest will be presumed when the events specified in clauses (a) to (c) have occurred "unless the parties have agreed to postpone the time for attachment, in which case the security interest attaches at the agreed time".*

4. *The words "including a security interest in the nature of a floating charge" have been added to the opening part of subsection (2) to make it clear that the general rules for attachment of a security interest apply to a security interest created in or provided for in a floating charge. For a decision to the same effect under existing s. 12, see* ***Re Huxley Catering Ltd.; Irving A. Burton Ltd. v. Canadian Imperial Bank of Commerce*** *(1982), 36 O.R. (2d) 703 (C.A.).*

5. *Subsection 12(2) has been renumbered as subsection (3). The Committee is of the view that it would be more appropriate to include a reference to "the young of animals until they are conceived" in clause (3)(c) rather than in s. 12(1) of the Draft Act. Clause 3(d) contains a small amendment to s. 12(2)(c) of the present Act. A reference is made to "hydrocarbons" rather than oil and gas because the former term, which is used in s. 12(2)(c) of the Uniform Act, is broader in meaning and more accurately describes non-mineral substances that are extracted from below the surface.*

After-acquired property

12. (1) A security agreement may cover after-acquired property.

Exception

(2) No security interest attaches under an after-acquired property clause in a security agreement,

(a) to crops that become such more than one year after the security agreement has been executed, except that a security interest in crops that is given in conjunction with a lease, purchase or mortgage of land may, if so agreed, attach to crops to be grown on the land concerned during the term of such lease, purchase or mortgage; or

(b) to consumer goods, other than accessions, unless the debtor acquires rights in them within ten days after the secured party gives value. R.S.O.1980, c.375,s.13,*amended.*

COMMENTARY

This section is derived from s. 13 of the present Act. The phrase "and the young of animals after conception" has been deleted from subsection (1) and similar wording has been added to s. 11(3)(c) (see the commentary on s. 11).

Future advances

13. A security agreement may secure future advances. R.S.O.1980,c.375,s.15,*amended*.

COMMENTARY

This section is derived from s. 15 of the present Act. Since the proposed definition of "future advance" in s. 1(12) of the Draft Act incorporates some of the language now contained in s. 15 of the Act, the section has been considerably shortened. It simply states that a security agreement may secure future advances. See also the special priority rules for future advances in ss. 33(3) and (4) of the Draft Act.

Agreement not to assert defence against assignee

R.S.C.1970, c.B-5

14. (1) An agreement by a debtor not to assert against an assignee any claim or defence that the debtor has against the debtor's seller or lessor is enforceable by the assignee who takes the assignment for value, in good faith and without notice, except as to such defences as may be asserted against a holder in due course of a negotiable instrument under the *Bills of Exchange Act* (Canada). R.S.O.1980, c.375,s.16.

Non-application R.S.O.1980, c.87,s.31

(2) Subsection (1) does not apply to an assignment to which section 31 of the *Consumer Protection Act* applies. *New.*

COMMENTARY

1. *This section is derived from s. 16 of the present Act. The opening phrase of the section "except as to consumer goods" has been deleted and replaced by a new subsection (2), which provides that subsection (1) does not apply to an assignment which is subject to s. 31 of the Consumer Protection Act. Section 31 is similar to s. 16 of the Act, but differs from it in that it limits the amount of a debtor's claim against an assignee.*

2. *The Committee recommends the deletion of s. 14 of the present Act. Section 14 states that a purchase-money security interest in consumer goods does not attach to any collateral other than such consumer goods. This provision makes no sense because a purchase-money security interest, by definition, can only attach to the collateral which is the subject of a sale or whose purchase has been procured with the assistance of the secured party's loan. See also the related provisions in s. 12(2)(b) of the Draft Act and s. 22 of the Consumer Protection Act.*

Seller's warranties R.S.O.1980, c.462

15. Where a seller retains a purchase-money security interest in goods,

(a) the *Sale of Goods Act* governs the sale and any disclaimer, limitation or modification of the seller's conditions and warranties; and

(b) except as provided in section 14, the conditions and warranties in a sale agreement shall not be affected by any security agreement. R.S.O.1980,c.375,s.17,*amended*.

COMMENTARY

This section is derived from s. 17 of the present Act. The cross-reference in clause (b) has been changed from s. 16 to s. 14 to correspond to the renumbered section in the Draft Act.

Acceleration provisions

16. Where a security agreement provides that the secured party may accelerate payment or performance if the secured party considers that the collateral is in jeopardy or that the secured party is insecure, the agreement shall be construed to mean that the secured party may accelerate payment or performance only if the secured party in good faith believes and has commercially reasonable grounds to believe that the prospect of payment or performance is or is about to be impaired or that the collateral is or is about to be placed in jeopardy. R.S.O.1980,c.375,s.18,*amended*.

COMMENTARY

The Committee recommends that s. 18 of the present Act, which deals with acceleration clauses, be replaced by s. 15 of the Uniform Act in the interests of uniformity. As a consequence, the power of a secured party to invoke an acceleration clause in a security agreement will be limited by the additional requirement that there be commercially reasonable grounds for the belief that the prospect of payment or performance is or is about to be impaired or that the collateral is or is about to be put in jeopardy.

Care of collateral

17. (1) A secured party shall use reasonable care in the custody and preservation of collateral in the secured party's possession, and, unless otherwise agreed, in the case of an instrument or chattel paper, reasonable care includes taking necessary steps to preserve rights against prior parties. R.S.O.1980,c.375,s.19(1).

Idem, rights and duties of secured party

(2) Unless otherwise agreed, where collateral is in the secured party's possession,

(a) reasonable expenses, including the cost of insurance and payment of taxes or other charges incurred in obtaining and maintaining possession of the collateral and in its preservation, are chargeable to the debtor and are secured by the collateral;

(b) the risk of loss or damage, except where caused by the negligence of the secured party, is on the debtor to the extent of any deficiency in any insurance coverage;

(c) the secured party may hold as additional security any increase or profits, except money, received from the collateral, and money so received, unless remitted to the debtor, shall be applied forthwith upon its receipt in reduction of the obligation secured;

(d) the secured party shall keep the collateral identifiable, but fungible collateral may be commingled; and

(e) the secured party may create a security interest in the collateral upon terms that do not impair the debtor's right to redeem it. R.S.O.1980,c.375,s.19(2),*amended*.

Liability for loss

(3) A secured party is liable for any loss or damage caused by the secured party's failure to meet any obligations imposed by subsection (1) or (2), but does not lose the security interest in the collateral.

Use of collateral

(4) A secured party may use the collateral,

(a) in the manner and to the extent provided in the security agreement;

(b) for the purpose of preserving the collateral or its value; or

(c) pursuant to an order of,

(i) the court before which a question relating thereto is being heard, or

(ii) the District Court upon application by the secured party.

Idem

(5) A secured party,

(a) is liable for any loss or damage caused by the secured party's use of the collateral otherwise than as authorized by subsection (4); and

(b) is subject to being ordered or restrained as provided in subsection 67(1). R.S.O.1980,c.375,s.19.

COMMENTARY

1. *This section is derived from s. 19 of the present Act.*

2. *Clause 19(2)(a) provides for certain expenses to be chargeable to the debtor while the collateral is "in the custody" of the secured party. An uncertificated security is recorded in the accounts of a clearing corporation and is ordinarily shown as an entry in a computer file. Under s. 85(4) of the OBCA if a pledge or the creation of a security interest is intended, the making of an entry in the records of the clearing corporation has the effect of a taking of delivery by a secured party, and the secured party is deemed to have taken possession for all purposes, including the purposes of the PPSA. A secured party should be able to charge the debtor with any costs incurred in obtaining a transfer of a security into a pledge account in the records of the clearing corporation and maintaining those records. Therefore the words "in obtaining and maintaining possession" in clause 2(a) have been substituted for "in the custody".*

Statements of account

18. (1) A person who is a debtor or judgment creditor or who has an interest in the collateral may, by a notice in writing given to the secured party and containing an address for reply, require the secured party to furnish to the person any one or more of,

(a) a statement in writing of the amount of the indebtedness and the terms of payment thereof as of the date specified in the notice;

(b) a statement in writing approving or correcting as of the date specified in the notice a statement of the collateral or a part thereof as specified in a list attached to the notice;

(c) a statement in writing approving or correcting as of the date specified in the notice a statement of the amount of the indebtedness and of the terms of payment thereof;

(d) a true copy of the security agreement; or

(e) sufficient information as to the location of the security agreement and any copy thereof so as to enable inspection of the security agreement or copy.

Exception, indenture trustee

(2) Clauses (1)(a), (b) and (c) do not apply where the secured party is the trustee under a trust indenture.

Inspection of security agreement

(3) The secured party, on the reasonable request of a person entitled to receive a true copy of the security agreement under clause (1)(d), shall permit the person or the person's authorized representative to inspect the security agreement or a true copy thereof during normal business hours at the location disclosed under clause (1)(e).

Idem

(4) If the secured party claims a security interest in all of a particular type of collateral owned by the debtor, the secured party may so indicate in lieu of approving or correcting the list of such collateral as required by clause (1)(b).

Time for compliance with notice, liability for failure to answer

(5) Subject to the payment of any charge required under subsection (8), the secured party shall answer a notice given under subsection (1) within fifteen days after receiving it, and, if without reasonable excuse the secured party fails to do so or the answer is incomplete or incorrect, the secured party is liable for any loss or damage caused thereby to any person entitled to receive information under this section.

Successors in interest

(6) Where the person receiving a notice under subsection (1) no longer has a security interest in the collateral, the person shall, within fifteen days after receiving the notice, disclose the name and address of the latest successor in interest known to the person, and, if without reasonable excuse the person fails to do so or the answer is incomplete or incorrect, the person is liable for any loss or damage caused thereby to any person entitled to receive information under this section.

Charges

(7) The secured party may require payment in advance of the charge prescribed for each statement or copy of the security agreement required under subsection (1), but the debtor is entitled to a statement without charge once in every six months.

Court order

(8) On an application to the District Court, the court, by order, may,

(a) exempt, in whole or in part, the secured party from complying with a notice given under subsection (1), or a request under subsection (3), if the person giving the notice, not being the debtor, does not establish to the satisfaction of the court that the person has an interest in the collateral or that the person is a judgment creditor;

(b) extend the time for complying with the notice given under subsection (1);

(c) require the secured party to comply with a notice given under subsection (1) or a request under subsection (3); or

(d) make such other order as it considers just.

Liability

(9) An order made under clause (8)(b) or (c) does not affect the liability of the secured party under subsection (5).

Extended time for compliance

(10) Notwithstanding subsection (9), where the secured party applies to the District Court for an extension of time under clause (8)(b) within fifteen days of receiving a notice under subsection (1) and the court makes an order extending the time for compliance, the secured party shall answer the notice within the time as extended and not within the time as required by subsection (5) and, if without reasonable excuse the secured party fails to answer the notice within the time as extended or the answer is incomplete or incorrect, the secured party is liable for any loss or damage caused thereby to any person entitled to receive information under this section. R.S.O.1980,c.375,s.20, *amended.*

COMMENTARY

1. *Subsection (1) has been amended by the substitution of "judgment creditor" for "execution creditor". A person with a judgment should not be required to commence execution proceedings before being entitled to obtain information relating to the judgment debtor's property.*

2. *Clause (1)(e) is a new provision based on s. 17(1)(e) of the Uniform Act. The notice to be sent to the secured party must contain sufficient information as to the location of the security agreement or any copy to enable the document to be inspected.*

3. *Subsection (2) is a new provision and provides that clauses 1(a), (b) and (c) do not apply where the secured party is the trustee under a trust indenture. The trustee will in most cases not be in a position to answer enquiries concerning the state of indebtedness or whether specified items of collateral are subject to the security agreement.*

4. *Subsection (3) will require secured parties to permit inspection of the security agreement by persons entitled to receive a true copy during normal business hours at the location disclosed under s. (1)(e). The words "entitled to receive the information pursuant to this section" have been added after the words "or any other person" at the end of ss. (5), (6) and (11) for purposes of clarification.*

5. *Subsection (5) of the present Act has been deleted because it is unnecessary to deem the successor in interest to be a secured party. Even though he may no longer be a secured party, a successor in interest who receives a notice under subsection (1) has a separate obligation under subsection (6) to disclose the latest successor in interest known to him.*

6. *The fee to be charged by a secured party under s. 20(6) of the Act will no longer be prescribed by the section itself but instead will be set by regulation pursuant to subsection 18(8) of the Draft Act.*

7. *Subsection (9) gives the Court jurisdiction to exempt a secured party from, or to extend the time for, compliance with the application of the section. If the secured party does not answer the notice within the extended time for compliance, it may be liable under subsection (11) for any loss or damage caused thereby to the debtor or any other person.*

PART III

PERFECTION AND PRIORITIES

Perfection

19. A security interest is perfected when,

(a) it has attached; and

(b) all steps required for perfection under any provision of this Act have been completed,

regardless of the order of occurrence. R.S.O.1980,c.375,s.21.

COMMENTARY

This section is derived from s. 21 of the present Act.

Unperfected security interests

20. (1) Except as provided in subsection (3), an unperfected security interest,

(a) in collateral is subordinate to the interest of,

(i) a person who has a perfected security interest in the same collateral or who has a lien given under any other Act or by a rule of law or who has a priority under any other Act, or

(ii) a person who assumes control of the collateral through execution, attachment, garnishment, charging order, equitable execution or other legal process, or

R.S.O.1980, c.103

(iii) all persons entitled by the *Creditors' Relief Act* or otherwise to participate in the distribution of the property over which a person described in subclause (ii) has assumed control, or the proceeds of such property;

(b) in collateral is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy;

(c) in chattel paper, documents of title, securities, instruments or goods is not effective against a transferee thereof who takes under a transfer that does not secure payment or performance of an obligation and who gives value and receives delivery thereof without knowledge of the security interest and before it is perfected; and

(d) in intangibles other than accounts is not effective against a transferee thereof who takes under a transfer that does not secure payment or performance of an obligation and who gives value without knowledge of the security interest and before it is perfected.

Idem

(2) The rights of a person under clause (1)(b) in respect of the collateral are referable to the date from which the person's status has effect.

Purchase-money security interest

(3) A purchase-money security interest that is perfected by registration,

(a) in collateral, other than an intangible, within ten days after,

(i) the debtor obtains possession of the collateral, or

(ii) a third party, at the request of the debtor, obtains possession of the collateral,

whichever is earlier; or

(b) in an intangible within ten days after the attachment of the security interest in the intangible,

has priority over,

(c) an interest set out in subclause (1)(a)(ii) and is effective against a person described in clause (1)(b); and

(d) the interest of a transferee of the collateral by a transfer, other than a transfer in the ordinary course of the transferor's business, occurring between attachment and registration of a financing statement in respect of the security interest. R.S.O.1980,c.375, s.22,*amended*.

Deemed unperfection

(4) A security interest that attached more than sixty days before the effective date of the bankruptcy of the debtor and that was perfected less than thirty days before that date shall be deemed to be unperfected as against the trustee in bankruptcy. *New*.

COMMENTARY

1. *This section, which is derived from s. 22 of the present Act, deals with the consequences of a security interest being unperfected.*

2. *Clause 1(a) has been substantially revised. Subclause 1(a)(i) clarifies that an unperfected security interest is subordinate to a perfected security interest in the same collateral. This fundamental principle is implicit in the present Act, but the Committee is of the view that the Draft Act should expressly set out all priority rules. Some statutes merely create a lien while other statutes go further and assign a priority to the lien. To resolve any uncertainty as to the position of such statutory liens, the subclause provides that in both such cases the lienholder will have priority over an unperfected security interest.*

3. *Subclause 1(a)(ii), as worded at present, accords priority to an execution creditor only where he acts without knowledge of the unperfected security interest and before its perfection. The references to knowledge and the time of perfection have been deleted. The corresponding provision in the Uniform, Manitoba and Saskatchewan Acts does not contain a test involving knowledge. The execution creditor should be protected because he puts effort and expense into obtaining judgment and proceeding to execute. The secured party who neglects to perfect his security interest should not be able to prejudice the rights of the execution creditor by simply notifying him of the existence of the security interest. The words "time of perfection" are an unnecessary duplication since, by its opening words, subsection (1) only applies to unperfected security interests.*

4. *A second proposed amendment to subclause 1(a)(ii) sets out examples of various legal processes by which a judgment creditor may assume control of the collateral. The purpose of the amendment is to make it clear that distress and self-help are excluded as means of assuming control of collateral and thereby achieving priority over an unperfected security interest. The present Act is unclear as to whether an execution creditor who assumes control of collateral may, by reason of s. 69, escape his obligation to share ratably with other creditors under the Creditors' Relief Act. Subclause 1(a)(iii) of the Draft Act makes it clear that the scheme of the Creditors' Relief Act takes priority over the rights of the individual seizing creditor.*

5. *Subclause 1(a)(iii) of the present section refers to "the interest of a person...who represents the creditors of the debtor" (e.g., a trustee in bankruptcy). An "interest" may be construed to mean "rights" and that term is used in subsection (2). The Committee proposes that the subclause be renumbered as clause 1(b). The subsection has been amended by substituting the words "not effective against" for the words "is subordinate to the interest of a person" who represents the creditors of the debtor. The new wording is more precise and accords*

with the usage of s. 9, which speaks of the "effectiveness" of a security interest. This wording avoids the difficulty in the old language that a trustee in bankruptcy may not have an interest distinct from the interest of the creditors he or she represents and therefore may be unable to satisfy the conditions of the subsection. A complementary change of wording has been made to subsection (3).

6. *Clause 22(1)(b) of the Act has been divided into two separate clauses. Clause 1(c) of the Draft Act deals with the priority of an absolute transferee of chattel paper, documents of title, securities, instruments or goods who acquire an interest other than a security interest (the transfer must not secure payment or performance of an obligation). The qualification that the transferee (buyer) prevails only to the extent of the new value given by the transferee has been deleted in order to eliminate any suggestion that a transferee who had paid the full price could be obliged to give up the collateral provided he was reimbursed his investment. See* **Royal Bank of Canada** *v.* **Dawson Motors (Guelph) Ltd.** *(1981), 15 B.L.R. 83, 39 C.B.R. (N.S.) 304 (Ont. Co. Ct.) and Jacob S. Ziegel, "Royal Bank of Canada v. Dawson Motors (Guelph) Ltd.: A Postscript" (1982), 6 C.B.L.J. 507.*

7. *Clause (1)(d) provides a special priority rule for the absolute transferee of an interest in intangibles other than accounts. An absolute transferee of accounts has been excluded from the class of protected transferees on the grounds that the entire Act applies to such non-security transfers and the rights of the transferees should logically be determined under s. 33 (the general priority provisions).*

8. *Subsection (2) has been amended by the removal of any reference to the knowledge of the represented creditors. This class of unsecured creditors is in a position similar to that of the judgment creditor under subclause 1(a)(ii). The dilatory secured party with an unperfected security interest should not be permitted to prejudice the rights of the unsecured creditors represented by a trustee in bankruptcy by merely notifying them of the existence of the security interest. The subsection, as amended, has been retained in order to cover the "relation back" concept embodied in s. 50(4) of the Canadian Bankruptcy Act. The trustee in bankruptcy's status has effect from the date of filing of the petition for a receiving order in the case of an involuntary bankruptcy.*

9. *Clause 3(a) is concerned with the priority of a purchase-money security interest in collateral other than an intangible that has been perfected by registration. Subclause 3(a)(ii) is a new provision which is intended to solve the problem created by the fact that leased goods subject to a security interest are commonly delivered directly to a lessee. The lessor-debtor never obtains possession of the collateral (the leased goods). It may be impractical and uneconomic for a lessor to take delivery of heavy equipment and machinery and then redeliver them to the lessee. In these circumstances priority will be established when perfection by registration takes place within ten days after delivery to a lessee (a third party) at the request of the debtor. If the lessee first obtains possession but later delivers the goods to the lessor, the ten-day period commences with the first delivery to the lessee. Clause (3)(b) covers the priority of a purchase-money security interest in intangible collateral. The purchase-money security interest must be perfected by registration within ten days after attachment in order to have priority over the interest of execution creditors and to be effective against the trustee in bankruptcy.*

10. *Section 47 of the present Act requires a financing statement to be registered within thirty days of the execution of an agreement. This time filing requirement did not appear in the original Draft Act and the Committee is firmly of the view that the time filing requirement should be deleted. Effect to this recommendation is given in s. 45 of the Draft Act. When the Committee made the same recommendation in 1980 (see the 1980 Draft Bill), it was recognized that the deletion of a time filing requirement might give rise to the danger of parties deliberately abstaining from registering a financing statement until a debtor was in financial difficulties. To discourage such behaviour the 1980 Draft Bill included a sheltered period provision. See section 22 of the 1980 Draft Bill. The provision attracted more criticism from members of the Bar than any provision in the Draft Bill. In the Committee's view, the criticisms were justified, and accordingly the sheltered period provision does not*

reappear in this Draft Act. Instead we have substituted a provision (see subsection (4)) which has the same objective but which, in our view, will be much simpler and easier to apply. The effect of subsection (4) is to deem a security interest to be unperfected as against the trustee in bankruptcy if the secured party delays perfection (either by registration or possession) for more than thirty days after attachment and until shortly before the effective date of bankruptcy (i.e., perfection occurs within thirty days prior to that date). The subsection provides an additional incentive to encourage secured parties to register promptly.

Continuity of perfection

21. (1) If a security interest is originally perfected in any way permitted under this Act and is again perfected in some way under this Act without an intermediate period when it was unperfected, the security interest shall be deemed to be perfected continuously for the purposes of this Act.

Assignees

(2) An assignee of a security interest succeeds in so far as its perfection is concerned to the position of the assignor at the time of the assignment. R.S.O. 1980,c.375,s.23.

COMMENTARY

This section is derived from s. 23 of the present Act.

Perfection by possession or repossession

22. Possession or repossession of the collateral by the secured party, or on the secured party's behalf by a person other than the debtor or the debtor's agent, perfects a security interest in,

(a) chattel paper;

(b) goods;

(c) instruments;

(d) securities;

(e) negotiable documents of title; and

(f) money,

but only while it is actually held as collateral. R.S.O.1980,c.375,s.24,*amended*.

COMMENTARY

1. *This section is derived from s. 24 of the present Act. The words "or repossession" have been added after "possession" in the first line of the section to make it clear that a security interest can be perfected by repossession of the specified classes of collateral for the purposes of realization. This is intended to resolve the doubts raised by Steele J. in* **Re Darzinkas** *(1981), 34 O.R. (2d) 782, 132 D.L.R. (3d) 77. Letters of credit and advices of credit have been deleted as a separate category of collateral capable of perfection by possession due to the amendment to the definition of instrument (see the commentary on s. 1(14) of the Draft Act).*

2. *The Committee recommends that "money" be added to s. 24 as a class of collateral that can be perfected by possession (see the new definition of "money" in s. 1(18) of the Draft Act). Where a debtor pledges money rather than paying it, the secured party ought not to lose priority for failing to perfect by registration as if money were an intangible.*

Perfection by registration

23. Registration perfects a security interest in any type of collateral. *New*.

COMMENTARY

1. *This section is derived from s. 25 of the present Act. Under ss. 24 and 25 of the present Act, instruments, securities, letters of credit and advices of credit may only be perfected by possession. The present restrictions on perfection by possession are based on Article 9 of the Uniform Commercial Code and American security practices, which are not the same as ours.*

2. *Section 23 permits a secured party to perfect by registration a security interest in every type of collateral. The Committee is of the view that this amendment will facilitate the integration of corporation securities into the Act. Many corporate bonds, debentures and trust indentures cover all the assets of the corporate debtor. A similar policy has been adopted in the Saskatchewan and Uniform Acts. It should be noted that the section will not preclude a secured party from perfecting by possession in those cases permitted by the Act. The possibility of perfection by registration will not prejudice the position of persons dealing in the course of business with negotiable and quasi-negotiable instruments and documents, interests in which are normally created by transfer of possession coupled with any necessary endorsements. The interest of such parties is protected under ss. 28 and 29.*

Temporary perfection

24. (1) A security interest in instruments, securities or negotiable documents of title is a perfected security interest for the first ten days after it attaches to the extent that it arises for new value given under a security agreement signed by the debtor and the secured party. R.S.O. 1980,c.375,s.26(1).

Idem

(2) A security interest perfected by possession in,

(a) an instrument or a security that a secured party delivers to the debtor for,

(i) ultimate sale or exchange,

(ii) presentation, collection or renewal, or

(iii) registration of transfer; or

(b) a negotiable document of title or goods held by a bailee that are not covered by a negotiable document of title, which document of title or goods the secured party makes available to the debtor for the purpose of,

(i) ultimate sale or exchange,

(ii) loading, unloading, storing, shipping or trans-shipping, or

(iii) manufacturing, processing, packaging or otherwise dealing with goods in a manner preliminary to their sale or exchange,

remains perfected for the first ten days after the collateral comes under the control of the debtor. R.S.O.1980,c.375,s.26(2),*amended*.

Idem

(3) Beyond the period of ten days referred to in subsection (1) or (2), a security interest under this section becomes subject to the provisions of this Act for perfecting a security interest. R.S.O.1980,c.375,s.26(3).

COMMENTARY

This section is derived from s. 26 of the present Act. The type of collateral which can be temporarily perfected under the circumstances specified in subsection (2) has been expanded to include securities as well as instruments. Subsection 24(2) of the Uniform Act contains an equivalent provision. The amendment will be useful when a secured party is required to relinquish possession of share certificates to a debtor for a limited period for the purpose of making an exchange of securities related to a take-over bid. The secured party should be able to do this without the security interest becoming unperfected or substituted collateral being pledged.

Perfecting as to proceeds

25. (1) Where collateral gives rise to proceeds, the security interest therein,

(a) continues as to the collateral, unless the secured party expressly or impliedly authorized such dealing; and

(b) extends to the proceeds. R.S.O.1990,c.375,s.27(1),*amended*.

Idem

(2) A security interest in proceeds is a continuously perfected security interest if the interest in the collateral was perfected when the proceeds arose.

Idem

(3) If a security interest in collateral was perfected otherwise than by registration, the security interest in the proceeds becomes unperfected ten days after the debtor obtains possession of the proceeds unless the security interest in the proceeds is perfected under this Act.

Motor vehicles classified as consumer goods

(4) Where the original collateral is a motor vehicle classified as consumer goods and the proceeds include a motor vehicle classified as consumer goods, the security interest in the motor vehicle that is proceeds becomes unperfected ten days after the proceeds arise unless the secured party registers a financing change statement that sets out the vehicle identification number of the motor vehicle.

Interpretation

(5) For the purpose of subsection (4), "motor vehicle" means a motor vehicle as defined in the regulations. *New*.

COMMENTARY

1. *This section is derived from s. 27 of the present Act. The opening words of subsection (1) have been shortened because the definition of "proceeds" in s. 1(22) contains all the necessary references to dealing with collateral (see the commentary on s. 1(22)).*

2. *Under s. 27(2) of the present Act a secured party has a perfected security interest in proceeds so long as a financing statement has been properly registered with respect to the original collateral and the security interest in the original collateral was perfected when the proceeds were created. Subsection (2) of the Draft Act clarifies this policy. A perfected security interest in the original collateral automatically extends to every type of proceeds. The Committee felt that given the ease with which security interests may be claimed in proceeds under the existing financing statement, perfection of a security interest in proceeds was a meaningless formality. A secured party could be expected to claim a security interest in proceeds as a matter of course.*

3. *If the security interest in the original collateral was perfected other than by registration (e.g., by possession), a further step is required to preserve the perfected status of the security interest in the proceeds. Subsection (3) provides that the security interest in the proceeds becomes unperfected ten days after the debtor obtains possession of the collateral unless it is perfected under the Act (e.g., by registration of a financing statement). This subsection is a restatement of the principle already embodied in s. 27(2) of the present Act, and is intended to protect persons dealing with proceeds in the hands of the debtor. Reference should also be made to s. 33(5) of the Draft Act, which contains a rule for the determination of the date of registration or perfection as to proceeds for the purpose of the general priority rules in s. 33.*

4. *Subsection (4) is a new provision. Consumers buying a motor vehicle often rely on a motor vehicle serial number search, but the search may not disclose a registration where the vehicle represents proceeds from the disposition of other collateral. Under the present law there is no requirement to set out the serial number (vehicle identification number) of a vehicle that is proceeds in a financing change statement even though the vehicle is classified as consumer goods. Subsection (4) will protect the consumer buyer by imposing*

an obligation on a secured party to record the vehicle identification number in the registration system within ten days after a motor vehicle classified as consumer goods is traded in for another motor vehicle also classified as consumer goods. The failure to register a financing change statement recording the vehicle identification number within the required ten-day period will result in the security interest becoming unperfected. This amendment should encourage greater reliance on motor vehicle serial number searches.

Perfecting as to goods held by a bailee

26. (1) A security interest in goods in the possession of a bailee who has issued a negotiable document of title covering them is perfected by perfecting a security interest in the document, and any security interest in them otherwise perfected while they are so covered is subject thereto. R.S.O.1980,c.375,s.28(1).

Idem

(2) A security interest in collateral in the possession of a person, other than a bailee mentioned in subsection (1), is perfected by,

(a) issuance of a document of title in the name of the secured party;

(b) possession on behalf of the secured party; or

(c) registration. R.S.O.1980,c.375,s.28(2),*amended*.

COMMENTARY

1. *This section is derived from s. 28 of the present Act.*

2. *Subsection (2) has been amended by changing the collateral to which the section applies from "goods" to "collateral" and replacing the term "bailee", which connotes physical possession of tangible property by one person for another, with the term "person". The subsection will apply to security interests in any type of collateral, including intangible property such as uncertificated securities, which are in the "possession" of any person other than a bailee who has issued a negotiable document of title. For example, the section could cover the situation where one bank has arranged the entry in the records of a clearing corporation of a pledge of uncertificated securities for both itself and another bank which has a secondary position as a subordinate secured party of the common debtor. The making of the entry will perfect by possession the security interest of the subordinate secured party. See the notes on uncertificated securities in the commentary on s. 17 of the Draft Act.*

Goods returned or repossessed

27. (1) Where a debtor sells or leases goods that are subject to a security interest, the security interest in the goods reattaches to the goods, if,

(a) the buyer or lessee has taken free of the security interest under clause 25(1)(a) or subsection 28(1) or (2);

(b) the goods are returned to or repossessed by the debtor; and

(c) the obligation secured remains unpaid or unperformed.

Idem

(2) Where a security interest in goods reattaches under subsection (1), then any question as to,

(a) whether or not the security interest in the goods is perfected; and

(b) the time of its perfection or registration,

shall be determined as if the goods had not been sold or leased.

Where sale or lease creates an account or chattel paper

(3) If a sale or lease of goods creates an account or chattel paper and,

(a) the account or chattel paper is transferred to a secured party; and

(b) the goods are returned to or repossessed by the seller or lessor,

the transferee has a security interest in the goods.

Temporary perfection

(4) A security interest in goods arising under subsection (3) is perfected if the security interest in the account or chattel paper was also perfected but becomes unperfected on the expiration of ten days after the return or repossession of the goods unless the transferee registers a financing statement in respect of the security interest in, or takes possession of, the goods before the expiry of that period.

Transferee of account

(5) Where a transferee of an account has a perfected security interest in goods under subsections (3) and (4), for the purpose of determining the transferee's priority as to the goods, the transferee shall be deemed to have perfected a security interest in the goods at the time the transferee's security interest in the account was perfected.

Transferee of chattel paper

(6) Where a transferee of chattel paper has a perfected security interest in goods under subsections (3) and (4),

(a) as between the transferee and the holder of a perfected security interest that attached under subsection (1), the person who had priority as to the chattel paper also has priority as to the goods; and

(b) as between the transferee and a person other than the holder of a perfected security interest that attached under subsection (1), for the purpose of determining the transferee's priority as to the goods, the transferee shall be deemed to have perfected a security interest in the goods at the time the transferee's security interest in the chattel paper was perfected. R.S.O.1980, c.375,s.29,*amended*.

COMMENTARY

1. *Section 27 is based on s. 29 of the Uniform Act and replaces s. 29 of the present Act. While all these sections deal with the same subject, in the Committee's view, s. 29 of the Uniform Act is clearer and more comprehensive than s. 29 of the present Act.*

2. *Section 27 deals with the following circumstances: Goods sold or leased may have been subject to a security interest held by an inventory financer prior to the sale or lease. Where the dealing with the goods is authorized by the secured party or where the sale or lease is made in the ordinary course of the seller's or lessor's business, the buyer or lessee takes free of the security interest (see ss. 25(1)(a) and 28(1) and (2) of the Draft Act). The goods may later be returned to or repossessed by the seller or lessor who is a debtor. In these circumstances subsection (1) provides for the reattachment of the inventory financer's security interest in the goods. Under subsection (2) any question as to perfection of the reattached security interest or the time of its perfection or registration is to be determined as if the sale or lease had never occurred.*

3. *The sale or lease of goods may have created an account or chattel paper which was transferred to a secured party. For example, if a buyer enters into a conditional sale contract, the seller may give a possessory security interest in the resulting chattel paper. If the goods sold are returned to or repossessed by the seller, subsection (3) states that the transferee of the chattel paper or an account has a security interest in the goods. This security interest is temporarily perfected for ten days under subsection (4) if the security interest in the account or chattel paper was also perfected. In accordance with subsection (4) the transferee must register a financing statement related to the goods or take possession of them prior to the expiry of the ten-day period to maintain perfection beyond the ten-day period.*

4. *Subsections (5) and (6) contain special provisions relating to priority contests between the security interest of the transferee of the chattel paper or account and other security interests in the goods.*

Transactions in ordinary course of business, buyers of goods

28. (1) A buyer of goods from a seller who sells the goods in the ordinary course of business takes them free from any security interest therein given by the seller even though it is perfected and the buyer actually knows of it.

Idem, lessors of goods

(2) A lessee of goods from a lessor who leases the goods in the ordinary course of business holds the goods, to the extent of the lessee's rights under the lease, free from any security interest therein given by the lessor even though it is perfected and the lessee actually knows of it.

Idem, purchasers of chattel paper

(3) A purchaser of chattel paper who takes possession of it in the ordinary course of business has, to the extent that the purchaser gives new value, priority over any security interest in it,

(a) that was perfected by registration if the purchaser did not actually know at the time of taking possession that the chattel paper was subject to a security interest; or

(b) that has attached to proceeds of inventory under section 25, whatever the extent of the purchaser's knowledge.

Idem, purchasers of instruments

(4) A purchaser of collateral that is an instrument, negotiable document of title or security has priority over any security interest therein perfected by registration or temporarily perfected under section 23 or 24 if the purchaser,

(a) gave value for the interest purchased;

(b) purchased the collateral without notice that it was subject to a security interest; and

(c) has taken possession of the collateral.
R.S.O.1980,c.375,s.30,*amended*

COMMENTARY

1. *This section is derived from s. 30 of the present Act and incorporates the following changes:*

   (a) Subsection (1) has been amended by substituting the word "buyer" for "purchaser". "Purchaser" is used in the present Act but is not defined. It could therefore include a person who only acquires a security interest in the collateral (cf. the definitions of "purchase" and "purchaser" in ss. 1(23) and 1(25) of the Draft Act), although this clearly was not the intention of the draftsmen. The substitution of "buyer" for "purchaser" is intended to resolve any ambiguity on this point.

   (b) Subsection (2) is a new provision which provides that where a lessor leases goods in the ordinary course of business, the lessee holds the goods free of a security interest given by the lessor to the extent of the lessee's rights under the lease. The effect of the amendment is that where a lessor goes into default under his security agreement, the secured party who has financed the lessor will not be able to take possession from the lessee during the term of the lease. The lessee should also be able to exercise any option to purchase which has been provided for in the lease despite the lessor's default under his security agreement.

   (c) Subsection (3) is substantially the same as s. 30(2) of the present Act. Since provisions other than s. 23 of the Draft Act relate to perfection by registration, clause 2(a) has been amended by the substitution of the phrase "by registration".

   (d) Subsection (4) has been amended to enable a purchaser of collateral that is an instrument, negotiable document of title or security to have priority over any other security interest in the collateral perfected by registration or temporarily perfected under s. 25(3) if the three specified conditions are satisfied. This amendment is based

on s. 28(7) of the Uniform Act. It is required because a security interest in an instrument, negotiable document of title or security will be permitted to be perfected by registration as a result of the proposed amendment to s. 23. The amendment protects the transferability of these types of negotiable collateral and thus reflects current commercial practice. See also the commentary on s. 29 of the Draft Act.

Negotiable instruments, etc.
R.S.C.1970, c.B-5

29. The rights of a person who is,

(a) a holder in due course of a bill, note or cheque within the meaning of the *Bills of Exchange Act* (Canada); or

(b) a transferee from the debtor of money,

are to be determined without regard to this Act. R.S.O. 1980,c.375,s.31(1),*amended*.

COMMENTARY

1. *This section is derived from s. 31 of the present Act. A new clause (b) has been added to s. 29. It provides that the rights of a transferee from a debtor of money are to be determined without regard to the Act. This amendment is complementary to the amendment to s. 25, which permits a secured party to perfect a security interest in any collateral. Clause (b) should prevent a court from holding that registration of a financing statement is notice of a security interest in money to persons who acquire the money by way of payment or otherwise. The rights of such persons will be resolved by the common law. Current commercial practice relating to transfers of money should not be altered as a result of the proposed amendments to s. 25 and this section.*

2. *Clauses (1)(b) and (c) of the present Act have been deleted because the Committee is of the opinion that it would be better to protect purchasers or transferees of negotiable documents of title and securities who take possession in good faith, for value, and without notice by an amendment to s. 30(3) of the Act (s. 28(3) of the Draft Act), which sets out an affirmative statement of the priority rule now expressed in negative form in s. 31.*

3. *Subsection 31(2) has been deleted because it is unnecessary. All references to registration constituting notice have been deleted from the Draft Act. See the commentary on s. 51 of the Draft Act.*

Liens for materials and services

30. Where a person in the ordinary course of business furnishes materials or services with respect to goods that are subject to a security interest, any lien that the person has in respect of the materials or services has priority over a perfected security interest unless the lien is given by an Act that provides that the lien does not have such priority. R.S.O.1980,c.375,s.32,*amended*.

COMMENTARY

This section, which is derived from s. 32 of the present Act, gives a repairer's lien or warehouseman's lien priority over a perfected security interest. The words "in his possession" have been deleted in order to permit a non-possessory lien to have the same priority. At present the Mechanics' Lien Act does not contemplate such a lien. The exception clause has been amended so as to allow a lien to have priority unless it is given by an Act that provides it does not have such priority. Owing to a drafting error the present Act does not clearly establish this.

Alienation of rights of a debtor

31. The rights of a debtor in collateral may be transferred voluntarily or involuntarily notwithstanding a provision in the security agreement prohibiting transfer or declaring a transfer to be a default, but no transfer prejudices the rights of the secured party under the security agreement or otherwise. R.S.O.1980,c.375,s.33.

COMMENTARY

This section is derived from s. 33 of the present Act.

Crops

32. (1) A perfected security interest in crops or their proceeds, given not more than six months before the crops become growing crops by planting or otherwise, to enable the debtor to produce the crops during the production season, has priority over an earlier perfected security interest in the same collateral to the extent that the earlier interest secures obligations that were due more than six months before the crops become growing crops by planting or otherwise even though the person giving value has notice of the earlier security interest.

Idem

(2) Where, because of subsection (1), there is more than one perfected security interest given priority by that subsection, each shall rank equally according to the ratio that the amount advanced by each bears to the total amount advanced.

Purchase-money security interest, inventory

(3) A purchase-money security interest in inventory or its proceeds has priority over any other security interest in the same collateral given by the same debtor, if,

(a) the purchase-money security interest was perfected at the time,

(i) the debtor obtained possession of the inventory, or

(ii) a third party, at the request of the debtor, obtained possession of the inventory,

whichever is earlier;

(b) the purchase-money secured party gives notice in writing to any other secured party who has registered a financing statement in which the collateral is classified as inventory before the date of registration by the purchase-money secured party; and

(c) the notice referred to in clause (b) states that the person giving it has or expects to acquire a purchase-money security interest in inventory of the debtor, describing such inventory by item or type.

Purchase-money security interests other than inventory

(4) Except where the collateral or its proceeds is inventory or its proceeds, a purchase-money security interest in collateral or its proceeds has priority over any other security interest in the same collateral given by the same debtor if the purchase-money security interest,

(a) in the case of collateral, other than an intangible, was perfected within ten days after,

(i) the debtor obtained possession of the collateral, or

(ii) a third party, at the request of the debtor, obtained possession of the collateral,

whichever is earlier; or

(b) in the case of an intangible, was perfected within ten days after the attachment of the security interest in the intangible.

Competing purchase-money security interests

(5) A purchase-money security interest in collateral taken or reserved in compliance with the requirements of this section by the seller, lessor or consignor of the collateral to secure payment of any part of its price, has priority over any other purchase-money security interest in the same collateral. *New.*

COMMENTARY

1. *This section is derived from s. 34 of the present Act. Subsection (1) deals with the special priority of a perfected security interest in crops or their proceeds over an earlier perfected security interest to the extent that the obligations secured by the earlier security interest were due for a six-month period prior to the time the crops began growing. The intention of*

the rule is to facilitate the financing of the current year's crop. The Committee was informed that it is common practice for farmers to purchase seed grain and other agricultural inputs necessary to produce the crops in the late autumn in preparation for spring planting. Since the security interest is often given more than three months before the growing season commences, the secured party is not entitled to the protection afforded by subsection (1). The Committee has recommended that the priority be extended to cover perfected security interests given up to six months before the crops become growing crops to reflect the practices of farmers and agricultural suppliers. More than one perfected security interest may be given priority under subsection (1). In these circumstances subsection (2) provides that the security interests rank pro rata according to the ratio that the amount advanced by each bears to the total amount advanced.

2. *Subsection (3) (s. 34(2) of the present Act) sets out a special priority rule for purchase-money security interests in inventory or its proceeds. The words "given by the same debtor" have been added to the opening part of the subsection to clarify that the rule is only concerned with disputes involving a common debtor. The effect of the words is that a financer of used inventory will not obtain priority over a prior secured party holding a security interest granted by a prior possessor (owner) of the inventory. Clause 3(a) is a revised version of s. 34(2)(a). It is intended to solve the problem created by the possibility that a lessor who is a debtor never obtains possession of the collateral because the goods are delivered directly to the lessee. It may be impractical or uneconomic for a lessor to take delivery of heavy equipment and machinery and then redeliver to a lessee. In these circumstances priority will be established when perfection by registration takes place within ten days after delivery to a lessee (a third party) at the request of the debtor. This provision complements the similar amendment to s. 20(3)(a) of the Draft Act. Clause 3(b), which imposes a notice requirement as a precondition for priority, has been revised. The purchase-money inventory financer will no longer be obligated to give notice of his interest to a secured party whose security interest was actually known to him but not perfected. This requirement is inconsistent with the general policy of disregarding actual knowledge as a factor in the resolution of priority disputes. Even if the purchase-money inventory financer did not notify a person with a security interest which was actually known to him but unperfected, he would still rank ahead of that person under s. 20(1)(a) of the Draft Act by virtue of the fact he had perfected his security interest. The Uniform Commercial Code and the Uniform and Saskatchewan Acts have a provision similar to revised clause 3(b).*

3. *Subsection (4) (subsection (3) of the present Act) provides a special priority rule for a non-inventory purchase-money security interest in collateral or its proceeds. The clarifying words "given by the same debtor" have been added to parallel the change made to subsection (3). Clause 4(a) is a revised version of s. 34(3) of the present Act and parallels the amendment made to s. 20(3)(a) of the Draft Act (see the commentary on s. 20(3)(a)). Since intangibles cannot be possessed, the Committee proposes that the ten-day time period provided for in clause 4(b), during which perfection of a purchase-money security interest in an intangible must occur for purposes of the priority rule, should be linked to attachment of the security interest.*

4. *The Act does not at present deal with the problem of what happens when there are two competing purchase-money security interests in the same collateral. In* ***Re Polano and Bank of Nova Scotia*** *(1979), 23 O.R. (2d) 324, 95 D.L.R. (3d) 510 (Dist. Ct.) it was held that the general rules in s. 35 applied with the result that the purchase-money security interest which was registered first had priority over the other purchase-money security interest. See also (1979), 4 C.B.L.J. 54 at 75-78. Subsection (5) contains a new rule that gives a purchase-money security interest held by a seller and perfected within the ten-day period priority over other types of purchase-money security interests in the same collateral (e.g., a purchase-money security interest held by a financer). The notice and other requirements of subsections (3) and (4) must be complied with by the seller as a precondition for priority over the financer's purchase-money security interest. In the Committee's view a person who sells on credit should not be required to search the register to ascertain whether there are any registrations that may relate to the goods or other collateral being sold. This requirement would hinder ordinary sales transactions.*

Priorities, general rule

33. (1) If no other provision of this Act is applicable, the following priority rules apply to security interests in the same collateral:

1. Where priority is to be determined between security interests perfected by registration, priority shall be determined by the order of registration regardless of the order of perfection.
2. Where priority is to be determined between a security interest perfected by registration and a security interest perfected otherwise than by registration,
   (i) the security interest perfected by registration has priority over the other security interest if the registration occurred before the perfection of the other security interest, and
   (ii) the security interest perfected otherwise than by registration, if it was perfected first, has priority over the security interest perfected by registration.
3. Where priority is to be determined between security interests perfected otherwise than by registration, priority shall be determined by the order of perfection.
4. Where priority is to be determined between unperfected security interests, priority shall be determined by the order of attachment. R.S.O.1980,c.375,s.35(1),*amended*.

Idem

(2) For the purpose of subsection (1), a continuously perfected security interest shall be treated at all times as if perfected by registration, if it was originally so perfected, and it shall be treated at all times as if perfected otherwise than by registration if it was originally perfected otherwise than by registration. R.S.O.1980,c.375,s.35(2).

Future advances

(3) Subject to subsection (4), where future advances are made while a security interest is perfected, the security interest has the same priority with respect to each future advance as it has with respect to the first advance.

Exception

(4) A future advance under a perfected security interest is subordinate to the rights of persons mentioned in subclauses 20(1)(a)(ii) and (iii) if the advance was made after the secured party received notification of the interest of any such person unless the secured party is bound to make the advance, whether or not a subsequent event of default or other event not within the secured party's control has relieved or may relieve the secured party from the obligation.

Proceeds

(5) For the purpose of subsection (1), the date for registration or perfection as to collateral is also the date for registration or perfection as to proceeds. *New*.

COMMENTARY

1. *This section is derived from s. 35 of the present Act. Subsection (1) has been completely revised in order to clarify the basic rules which govern all priority disputes between perfected security interests in the same collateral which are not otherwise governed by another provision in the Act. The first rule is a restatement of s. 35(1)(a) of the present Act. The second rule contains the only change in policy. Under present s. 35(1)(b) when one competing security interest has been perfected by registration and a second security interest has been perfected by possession, the first secured party to perfect its security interest prevails. Under the proposed second rule the result may be reversed. The secured party who registers a financing statement before the perfection of the possessory security interest will have priority even though its security interest is perfected afterwards. The*

effect of the new rule is that the competing security interests will rank according to whether perfection or registration occurs first. The theory is that a creditor who intends to take a security interest and perfect by possession can learn of the existence of the other security interest by doing a personal property security search. This change in principle has been made in the interest of achieving uniformity with s. 33(1) of the Uniform Act and s. 9-312(5)(a) of the Uniform Commercial Code.

2. *The principle contained in s. 35(1)(b) of the present Act is still retained for the purposes of determining priority between two security interests perfected otherwise than by registration (the third rule in subsection (1)). Where there is a priority contest between two competing possessory security interests, the first to be perfected will rank first. The fourth rule is substantially the same as s. 35(1)(c). The order of attachment governs priority between two unperfected security interests in the same collateral.*

3. *Although a future advance clause is recognized in s. 13, the present Act does not state the priority of such advances in relation to competing security interests. Subsection (3) provides such a rule and gives a security interest with respect to each future advance the same priority as it had with respect to the first advance. Consequently, once a secured party has registered and perfected a security interest, he should be able to make future advances without first carrying out a search in the registration system. Subsection (4) states an exception to the rule. The rights of an execution creditor will not be subordinate to a security interest with respect to a subsequent advance where the secured party had prior knowledge of the existence of the execution creditor and was not contractually bound to make the advance. The intention of subsection (4) is to prevent a secured party who has learned about the execution creditor from extinguishing or diminishing the creditor's acquired rights in the collateral by enlarging the amount of the indebtedness by an additional advance.*

4. *Subsection 33(4) of the Uniform Act and 35(3) of the Saskatchewan Act provide that the date for the determination of the priority of conflicting security interests in proceeds is the same date as for the original collateral. Although this rule could be implied from other provisions in the Act, it has been incorporated into new subsection (5) for the sake of uniformity and greater certainty.*

Fixtures

34. (1) A security interest in goods that attached,

(a) before the goods became a fixture, has priority as to the fixture over the claim of any person who has an interest in the real property; or

(b) after the goods became a fixture, has priority as to the fixture over the claim of any person who subsequently acquired an interest in the real property, but not over any person who had a registered interest in the real property at the time the security interest in the goods attached and who has not consented in writing to the security interest or disclaimed an interest in the fixture.

Exceptions

(2) A security interest mentioned in subsection (1) is subordinate to the interest of,

(a) a subsequent purchaser for value of an interest in the real property; or

(b) a creditor with a prior encumbrance of record on the real property to the extent that the creditor makes subsequent advances,

if the subsequent purchase or subsequent advance under a prior encumbrance of record is made or contracted for without knowledge of the security interest and before notice of it is registered in accordance with section 54.

Removal of collateral

(3) If a secured party has an interest in a fixture that has priority over the claim of a person having an interest in the real property, the secured party may, on default and subject to the provisions of this Act respecting default, remove the fixture from the real property if, unless otherwise agreed, the secured party reimburses any encumbrancer or owner of the real property who is not the debtor for the cost of repairing any physical injury but excluding diminution in the value of the real property caused by the absence of the fixture or by the necessity for replacement.

Security

(4) A person entitled to reimbursement under subsection (3) may refuse permission to remove the fixture until the secured party has given adequate security for the reimbursement. R.S.O.1980,c.375,s.36(1-4). *amended*.

Notice

(5) The secured party who has the right to remove a fixture from real property shall serve, on each person who appears by the records of the proper land registry office to have an interest in the real property, a notice in writing of the secured party's intention to remove the fixture containing,

(a) the name and address of the secured party;

(b) a description of the fixture to be removed sufficient to enable it to be identified;

(c) the amount required to satisfy the obligation secured by the security interest of the secured party;

(d) a description of the real property to which the fixture is affixed sufficient to enable the real property to be identified; and

(e) a statement of intention to remove the fixture unless the amount secured is paid on or before a specified day that is not less than ten days after service of the notice.

Idem

R.S.O.1980, cc.230,445

(6) The notice mentioned in subsection (5) shall be served in accordance with section 68 or by registered mail addressed to the person to whom notice is to be given at the address furnished under section 166 of the *Land Titles Act* or section 37 of the *Registry Act*, or where no such address has been furnished, addressed to the solicitor whose name appears on the registered instrument by which the person appears to have an interest. *New*.

Retention of collateral

(7) A person having an interest in real property that is subordinate to a security interest in a fixture may, before the fixture has been removed from the real property by the secured party in accordance with subsection (3), retain the fixture upon payment to the secured party of the amount owing in respect of the security interest having priority over the person's interest. R.S.O.1980,c.375,s.36(5),*amended*.

COMMENTARY

1. *This section is derived from s. 36 of the present Act. Subsections 36(1) and (2) set out rules to determine priority between interests in real property and a security interest in fixtures. In the interests of uniformity with the Uniform and Saskatchewan Acts, these priority rules have been consolidated into one subsection without major policy or drafting changes.*

2. *Clause 36(3)(b) of the present Act subordinates a security interest to the interest of a subsequent execution creditor where a notice of the security interest is not registered in the proper land registry office. The Committee recommends the deletion of this rule because, in its view, the interest of an execution creditor, like the interest of the creditors*

represented by the trustee in bankruptcy, should only have priority if the security interest has not been perfected by registration in compliance with the provisions of Part IV of the Act (s. 20(1)(a) would then apply). The additional registration against the land of a notice of security interest should only be required to secure the priority of the secured party over the claims of a subsequent purchaser or mortgagee of the land. Subsection (2) has also been amended by changing the words "actual notice" to "knowledge" because the term "notice" has been removed from the Draft Act. An identical amendment has been made to s. 54(5) of the Draft Act. See also the commentary on s. 51. Clause 2(a) does not refer to a subsequent mortgagee because a mortgagee is included in the expanded definition of purchaser found in s. 1(24).

3. *Subsection (3) provides for a right of removal of the fixtures from the real property upon default under the security agreement and for provision of security for damages arising from the removal. For drafting purposes the subsection has been divided into two separate subsections; apart from this only minor changes in wording have been made. It should be noted that s. 67(1) of the Draft Act makes provision for a summary application to a court to resolve fixture priority disputes. The court may also determine any issues related to removal of the goods affixed to the real property, such as reimbursement for damage caused by removal and the amount of the deposit as security for the cost of the damage.*

4. *Both the Saskatchewan and Uniform Acts include a new provision defining the obligation to give a notice of intention to remove goods affixed to the real property and setting out the contents of the notice. The Committee recommends that a similar subsection (subsection (5)) be included in the Draft Act in order to enable persons with subordinate interests in the real property to exercise their right to retain the collateral pursuant to subsection (7). The prescribed contents of the notice are similar to the requirements of the notice which must be given under s. 58(5) of the present Act. Subsection (6) sets out guidelines for the service of the notice.*

Accessions

35. (1) Subject to subsections (2) and (3) of this section and section 37, a security interest in goods that attached,

(a) before the goods became an accession, has priority as to the accession over the claim of any person in respect of the whole; and

(b) after the goods became an accession, has priority as to the accession over the claim of any person who subsequently acquired an interest in the whole, but not over the claim of any person who had an interest in the whole at the date the security interest attached to the accession and who has not consented in writing to the security interest in the accession or disclaimed an interest in the accession as part of the whole.

Exceptions

(2) A security interest referred to in subsection (1),

(a) is subordinate to the interest of,

(i) a subsequent buyer of an interest in the whole, and

(ii) a creditor with a prior perfected security interest in the whole to the extent that the creditor makes subsequent advances,

if the subsequent sale or subsequent advance under the prior perfected security interest is made or contracted for before the security interest is perfected; and

(b) is subordinate to the interest of a creditor of the debtor who has caused the whole to be seized under judicial process to enforce a judgment, if the seizure occurs before the security interest is perfected. R.S.O.1980,c.375,s.37(1,2),*amended*.

Idem

(3) Notwithstanding clause (2)(b), a purchase-money security interest in an accession that is perfected before or within ten days after the debtor obtains possession of the accession has priority over the interest of a creditor referred to in that clause. *New*.

Removal of collateral

(4) If a secured party has an interest in an accession that has priority over the claim of any person having an interest in the whole, the secured party may, on default and subject to the provisions of this Act respecting default, remove the accession from the whole if, unless otherwise agreed, the secured party reimburses any encumbrancer or owner of the whole who is not the debtor for the cost of repairing any physical injury excluding diminution in value of the whole caused by the absence of the accession or by the necessity for replacement.

Security

(5) A person entitled to reimbursement under subsection (4) may refuse permission to remove the accession until the secured party has given adequate security for the reimbursement. R.S.O.1980,c.375,s.37(3),*amended*.

Notice

(6) The secured party who has the right to remove an accession from the whole shall serve, on each person known to the secured party as having an interest in the other goods and on any person with a security interest in such other goods perfected by registration against the name of the debtor or against the vehicle identification number of such other goods, if such number is required for registration, a notice in writing of the secured party's intention to remove the accession containing,

(a) the name and address of the secured party;

(b) a description of the accession to be removed sufficient to enable it to be identified;

(c) the amount required to satisfy the obligations secured by the security interest of the secured party;

(d) a description of the other goods sufficient to enable them to be identified; and

(e) a statement of intention to remove the accession from the whole unless the amount secured is paid on or before a specified day that is not less than ten days after service of the notice.

Idem

(7) The notice mentioned in subsection (6) shall be served in accordance with section 68 at least ten days before the accession is removed. *New*.

Retention of collateral

(8) A person having an interest in the whole that is subordinate to a security interest in the accession may, before the accession has been removed by the secured party in accordance with subsection (3), retain the accession upon payment to the secured party of the amount owing in respect of the security interest having priority over the person's interest. R.S.O.1980,c.375,s.37(4),*amended*.

COMMENTARY

1. *This section, which is based on s. 37 of the present Act, sets out special priority rules concerning security interests in accessions. The wording and format of the section parallel the structure of s. 34, which contains corresponding rules for security interests in fixtures. Minor amendments have been made to subsection (1). The cross-references to ss. 34(3) and 38 have been deleted on the grounds that they are superfluous. Each priority rule can stand on its own. Subsection (2), which is based on the wording of s. 35(2) of the Uniform Act, has been revised. Under clause 2(a) the security interest in the accession will be subordinate to the interest of a subsequent buyer or a creditor with a prior perfected security interest in the whole goods to the extent that he makes subsequent advances where the subsequent sale or subsequent advance is made or contracted for before the security interest in the accession is perfected. It should be noted that s. 37(2) of the present Act relates the priority*

of these persons to a lack of notice rather than perfection. The effect of the amendment is that a prospective purchaser or secured party who intends to make a subsequent advance must first search the registration system to ascertain whether there are any perfected security interests in the accession.

2. *Clause 2(b) sets out a similar priority rule for execution creditors, who will obtain priority by seizing the whole (the accession and the goods to which they are attached) before the security interest is perfected. Subsection (3), which is based on s. 35(3) of the Uniform Act and s. 36(3) of the Saskatchewan Act, contains an exception to the rule in clause 2(b). Special protection is given to a purchase-money security interest in the accession against the interest of the execution creditor. This provision is a logical extension of the purchase-money security interest philosophy of ss. 22(3) and 34 that a secured party who provides new value to the debtor ought to have priority to the extent of his value.*

3. *Subsection 37(3) of the present Act provides for a right of removal of the accession from the whole upon default under the security agreement and for provision of security for damages arising from the removal. For drafting purposes and to parallel the amendment to s. 36, this subsection has been divided into two separate subsections with only minor changes in wording (subsections (4) and (5)).*

4. *Both the Saskatchewan and Uniform Acts include a provision defining the obligation to give a notice of intention to remove an accession affixed to other goods and setting out the contents of the notice. A similar provision has been included in s. 34 of the Draft Act in relation to fixtures. The Committee recommends that a similar subsection (subsection (6)) be added to this section to enable the specified categories of persons to exercise their right to retain the collateral pursuant to subsection (8). The prescribed contents of the notice are similar to the requirements of the notice which must be given under s. 59(5) of the present Act. Subsection (7) provides that the notice must be served at least ten days before the goods are removed.*

5. *Reference should also be made to s. 67(1) of the Draft Act, which makes provision for a summary application to a court to resolve accession priority disputes. The court may also determine any issues related to removal of the accession, such as reimbursement for damage caused by removal and the amount of the deposit as security for the cost of the damage.*

Real property payments, rents

36. (1) A security interest in a right to payment under a lease of real property, to which this Act applies, is subordinate to the interest of a person who acquires for value the lessor's interest in the lease or in the real property thereby demised if the interest, or notice thereof, of the person is registered in the proper land registry office before the interest, or notice thereof, of the secured party is registered in the proper land registry office.

Mortgages

(2) A security interest in a right to payment under a mortgage or charge of real property, to which this Act applies, is subordinate to the interest of a person who acquires for value the mortgagee's or chargee's interest in the mortgage or charge if the interest of the person is registered in the proper land registry office before a notice of the security interest is registered in the proper land registry office. 1981,c.58,s.2.

COMMENTARY

1. *This section is substantially the same as s. 36a of the present Act. There is some uncertainty as to whether the wording of subsection (1) will protect a mortgagee of land who has taken an assignment of rents as collateral security against a subsequent assignee*

of the rental payments who registers notice of its interest in the proper land registry office after the mortgage is registered. It is open to question whether the mortgagee "has acquired for value the lessor's interest in the lease" and whether the registration of the mortgage constitutes registration of the lessor's interest or notice thereof. The standard form of mortgage gives the mortgagee a right of attornment of rents upon default when the mortgagee enters into possession of the land. The words "or in the real property thereby demised" have been added to the subsection to clarify that a mortgagee who enters into possession and attorns for rents after default under the mortgage will have priority over an assignee of rental payments as a result of the prior registration of the mortgage.

2. *Subsection (2) is concerned with a priority dispute between an assignee of the right to payment under a mortgage or charge and a person who acquires the mortgagee's or chargee's interest in the mortgage or charge, including the right to payment (e.g., an assignee of a mortgage). The words "for value" have been added after the phrase "the interest of a person who acquires". These words were inadvertently omitted from the subsection when it was enacted in 1981. The intention is to confer priority only on prior purchasers for value of the mortgagee's or chargee's interest in the mortgage or charge. A transfer of the interest without consideration will not be sufficient to obtain priority.*

Commingled goods

37. A perfected security interest in goods that subsequently become part of a product or mass continues in the product or mass if the goods are so manufactured, processed, assembled or commingled that their identity is lost in the product or mass, and, if more than one security interest attaches to the product or mass, the security interests rank equally according to the ratio that the cost of the goods to which each interest originally attached bears to the cost of the total product or mass. R.S.O.1980,c.375,s.38.

COMMENTARY

This section is identical to s. 38 of the present Act.

Subordination

38. A secured party may, in the security agreement or otherwise, subordinate the secured party's security interest to any other security interest. R.S.O.1980,c.375,s.39.

COMMENTARY

This section is identical to s. 39 of the present Act.

Person obligated on an account or on chattel paper

39. (1) Unless a person obligated on an account or on chattel paper has made an enforceable agreement not to assert defences or claims arising out of a contract, the rights of an assignee are subject to,

(a) all the terms of the contract between the person and the assignor and any defence or claim arising therefrom; and

(b) any other defence or claim of the person against the assignor that accrued before the person received notice of the assignment.

Idem

(2) A person obligated on an account or on chattel paper may pay the assignor until the person receives notice, reasonably identifying the relevant rights, that the account or chattel paper has been assigned, and, if requested by the person, the assignee shall furnish proof within a reasonable time that the assignment has been made, and, if the assignee does not do so, the person may pay the assignor. R.S.O.1980,c.375,s.40(1,2),*amended*.

Modification, etc., effective against assignee

(3) To the extent that the right to payment or part payment under an assigned contract has not been earned by performance, and notwithstanding notice of the assignment, any modification of or substitution for the contract, made in good faith and in accordance with reasonable commercial standards and without material adverse effect upon the assignee's right under or the assignor's ability to perform the contract, is effective against an assignee unless the person obligated on the account or chattel paper has otherwise agreed, but the assignee acquires corresponding rights under the modified or substituted contract. *New.*

COMMENTARY

1. *This section, which is based on s. 40 of the present Act, deals with the rights of account debtors and assignees. Two changes have been made to subsection (1) to parallel the wording of the equivalent provision in s. 38(1) of the Uniform Act. The term "account debtor" has been replaced by a reference to "a person obligated on an account or on chattel paper", and the definition of "account debtor" has been deleted from s. 1 of the Act. This amendment was made in the interests of uniformity. Present s. 40(1)(a) provides that the account debtor may make "an enforceable agreement not to assert defences or claims arising out of a sale as provided by section 16..." This provision could be interpreted to mean that only account debtors who are buyers may waive a defence or claim against an assignee. The word "contract" has been substituted for the words "sale as provided by section 16" to clarify that any person obligated on an account or on chattel paper may waive a defence or claim against an assignee.*

2. *Subsection (2) has been amended to provide that the person obligated on the account must receive notice, reasonably "identifying" the relevant rights, that the account has been assigned. The small change in wording makes it clear that the notice sent by the assignee must specifically identify the account that has been assigned.*

3. *The Ontario Law Reform Commission Report on the Sale of Goods concluded that it was unclear whether the modification of an executory contract by the account debtor and assignor, without the assignee's consent, was possible after the account debtor was notified of the assignment. The Committee recommends that subsection (3) be added to the section to permit modification of the contract in these circumstances as long as there is no material adverse effect upon the assignee's rights under, or the assignor's ability to perform, the contract. The subsection's function is to ensure the preservation of the assignor-account debtor relationship. The amendment follows s. 38(2) of the Uniform Act.*

PART IV

REGISTRATION

Registration system

40. (1) A registration system, including a central office and branch offices, shall be maintained for the purposes of this Act.

Central office

(2) The central office of the registration system shall be located at or near the City of Toronto.

Branch offices

(3) Branch offices of the registration system shall be established at such places as are designated by the regulations. R.S.O.1980,c.375,s.41.

COMMENTARY

This section is derived from s. 41 of the present Act.

Registrar, branch registrars

41. (1) There shall be a registrar of personal property security and a branch registrar for each branch office.

Idem

(2) The registrar shall be the public servant designated as registrar by the Minister of Consumer and Commercial Relations.

Idem

(3) The branch registrars shall be those public servants designated by name or position as branch registrars by the registrar.

Function

(4) It shall be the function of the registrar to supervise the operation of the registration system established for the purposes of this Act.

Seal of office

(5) The registrar shall have a seal of office in such form as the Lieutenant Governor in Council may by order approve. R.S.O.1980,c.375,s.42,*amended*.

COMMENTARY

1. *This section is derived from s. 42 of the present Act.*

2. *Subsection (2) is a new provision which states that the Minister of Consumer and Commercial Relations shall designate a public servant to be the registrar of personal property security. Similarly, under subsection (3) the registrar will designate public servants to be branch registrars. The section no longer refers to the Director of Land Registration because this official is not involved in the administration of the Act (see s. 42(2) of the present Act).*

Delegation

42. The registrar and each branch registrar may designate one or more public servants to act on his or her behalf. R.S.O.1980,c.375,s.43.

COMMENTARY

This section is identical to s. 43 of the present Act.

Certificate of registrar

43. (1) Upon the request of any person for a search of the individual debtor name index, business debtor name index or motor vehicle identification number index and upon payment of the prescribed fee, the registrar shall issue a certificate stating whether there is

registered at the time mentioned in the certificate a financing statement or financing change statement the registration of which is recorded in the central file of the registration system in which the requested name or number is shown in the designated place on the financing statement or financing change statement as a debtor or as a motor vehicle identification number, as the case may be, and, if there is, the registration number of it and any other recorded information. R.S.O.1980,c.375,s.44(1)(a),*amended*.

Certified copies

(2) The registrar shall furnish a certified copy of a registered financing statement or a registered financing change statement upon payment of the prescribed fee. R.S.O.1980,c.375,s.44(1)(b),*amended*.

Idem

(3) A certificate issued under subsection (1) is *prima facie* proof of the contents thereof.

Idem

(4) A certified copy furnished under subsection (2) is *prima facie* proof of the contents of the document so certified. R.S.O.1980,c.375,s.44(2,3).

COMMENTARY

1. *This section is derived from s. 44 of the present Act.*

2. *Under s. 44 the registrar is required to issue upon request a certificate showing all effective registrations in which the person named or the number enquired upon is shown in the designated place on the financing statement or financing change statement. A statement accepted for registration at a branch office will not be recorded in the computer until the following working day. A financing statement or financing change statement will therefore not be disclosed on a certificate which is requested on the same day that the statement is registered. See* **Royal Bank of Canada v. Dawson Motors (Guelph) Ltd.** *(1981), 15 B.L.R. 93, 39 C.B.R. (N.S.) 304 (Co. Ct.). The certificate always indicates that it sets out all effective registrations as of a specified prior date. The Committee recommends that subsection (1) be amended so that the registrar will only be obligated to set out registrations recorded in the central file of the registration system.*

3. *Clause 44(1)(b) has been set out as a separate subsection (s. 45(2) of the Draft Act) because the obligation to respond to a request for a search against a debtor name or a motor vehicle identification number is not related to the obligation to provide a certified copy of a registered statement.*

Assurance Fund

44. (1) The account in the Consolidated Revenue Fund known as "The Personal Property Security Assurance Fund" is hereby continued.

Idem

(2) The prescribed portion of the fees received under this Act shall be paid into the Assurance Fund. R.S.O.1980,c.375,s.45(1),*amended*.

Idem

(3) Interest shall be credited to the Assurance Fund out of the Consolidated Revenue Fund at a rate to be determined from time to time by the Lieutenant Governor in Council, and such interest shall be made up at the close of each fiscal year upon the balance in the Assurance Fund at the end of the previous calendar year. R.S.O. 1980,c.375,s.45(2).

Entitlement to payment

(4) Any person who suffers loss or damage as a result of the person's reliance upon a certificate of the registrar issued under section 43 that is incorrect because of an error or omission in the operation of the system of registration, recording and production of information under this Part or section 78 or as a result of the fraudulent

registration of a financing statement, financing change statement or certificate of discharge, is entitled to be paid compensation out of the Assurance Fund so far as the Assurance Fund is sufficient for that purpose, having regard to any claims which have been approved but have not been paid, if the person makes a claim therefor under subsection (5) within one year from the time that the loss or damage has come to the person's knowledge.

Claims

(5) A person claiming to be entitled to payment of compensation out of the Assurance Fund shall make application therefor in writing to the registrar, setting out therein the person's name and address and particulars of the claim.

Idem

(6) For the purposes of this section, where the holders of debt obligations issued, guaranteed or provided for under a security agreement are represented by a trustee or other person and the trustee or other person has relied upon a certificate of the registrar issued under section 43, each of the holders of such debt obligations shall be deemed to have relied on the certificate and where a claim is made under this section the claim shall be made by the trustee or other person on behalf of all the holders of such obligations.

Duty of registrar

(7) The registrar shall determine a claim for compensation within ninety days of receiving an application under subsection (5) and,

(a) where the registrar determines that the claim should not be paid, the registrar shall forthwith advise the claimant of the decision; or

(b) where the registrar determines that the claimant is entitled to a payment out of the Fund, the registrar shall make an offer of settlement in satisfaction of the claim,

and the decision or offer of settlement shall be deemed to be confirmed thirty days after the mailing thereof to the claimant unless the claimant requests a hearing under subsection (8).

Hearing

(8) Where the registrar makes a decision under clause (7)(a) or an offer of settlement under clause (7)(b) that is for less than the full amount of the claim, the claimant, within thirty days from the day that the decision or offer is mailed to the claimant, may request the registrar to hold a hearing to determine the claimant's entitlement to compensation and the request shall be in writing.

Idem

(9) As soon as possible after receiving a request under subsection (8), the registrar or, where a person has been appointed under subsection (10), the person so appointed shall hold a hearing and decide the claimant's entitlement to compensation and, if he or she considers it appropriate, award costs.

Delegation

(10) The registrar may appoint a person to act on his or her behalf in the hearing of a claim for compensation under this section.

Confirmation of decision

(11) A decision under subsection (9) shall be deemed to be confirmed at the expiration of thirty days from the date of the mailing of the decision to the claimant, unless a notice of an application under subsection (13) is served on the registrar within that time.

Application to District Court

(12) Where the registrar fails to determine a claim for compensation under subsection (7) within ninety days, the District Court, on the application of the claimant made within sixty days of the expiry of the ninety day period, may order the payment of such compensation as is set out in the order.

Idem

(13) Where the claimant is dissatisfied with a decision under subsection (9), the District Court, on the application of the claimant made within thirty days of the mailing of the decision to the claimant, may order that the decision under subsection (9) be set aside and may order the payment of such compensation as may be set out in the order.

Payment

(14) When an offer of settlement has been accepted or the time for an application under subsection (12) or (13) has expired or, where an application has been made, it is disposed of and it is finally determined that the claimant is entitled to payment of compensation out of the Assurance Fund, the registrar shall certify to the Treasurer of Ontario the sum found to be payable, including any costs awarded to the claimant, and the Treasurer shall pay the sum to the claimant out of the Assurance Fund.

Effect of payment out of Fund

(15) Where an application for compensation has been made under this section and the claim has been settled or determined, no proceeding may be commenced against the Crown, the registrar or anyone acting under his or her authority in respect of a matter upon which the application for compensation was based.

Subrogation

(16) Where compensation is paid to a claimant under this section, the registrar is subrogated to the rights of the claimant to the amount so paid against any person indebted to the claimant and whose debt to the claimant was the basis of the loss or damage in respect of which the claimant was paid, and the registrar may enforce those rights by action in court or otherwise in the name of Her Majesty in right of Ontario.

Action by claimant

(17) The registrar may require a claimant to exhaust the claimant's remedies against the collateral, the debtor and any guarantor and, where the registrar does so, the Assurance Fund is liable for the reasonable costs of the claimant, including solicitor and client costs.

Recovery in cases of fraud

(18) Any sum paid out of the Assurance Fund as a result of a loss or injury suffered by a person who relies on a certificate that is in error because of the fraudulent registration of a financing statement, financing change statement or certificate of discharge may afterwards be recovered by action, in the name of Her Majesty in right of Ontario, from any person who registered or caused to be registered the financing statement, financing change statement or certificate of discharge and the registrar's certificate of the payment out of the Assurance Fund is sufficient proof of the debt. *New.*

COMMENTARY

1. *This section replaces s. 45 of the Act. The Assurance Fund provisions have been substantially revised in order to achieve the goal of an expeditious, inexpensive and fair resolution of a claim for compensation. The formal proceedings before the Master of the Supreme Court will be replaced by a purely administrative procedure which is similar in character to the procedure for the hearing of claims against the Land Titles Assurance Fund.*

2. *The scope of the Assurance Fund has been expanded. Claims will be permitted for loss resulting from the fraudulent registration of a financing statement, financing change statement or certificate of discharge. This provision is necessary because injured parties may have no recourse against a person committing a fraudulent registration. A similar provision is found in s. 60 of the Land Titles Act. Subsection (18) gives the Crown a specific remedy against the perpetrator of the fraud where compensation has been paid to a claimant.*

3. The registrar will be required to determine the claim within ninety days after receiving the application to ensure the timely resolution of a claim. He will either refuse the claim, grant it in full or make an offer of settlement for an amount less than the full amount. Where the registrar decides that the claim should not be paid in full, the claimant is permitted, within the specified thirty-day period, to request in writing that a hearing be held. Additional evidence may be submitted at the hearing. In most cases the registrar will appoint another qualified person under subsection (10) to hear the claim to avoid the appearance of bias. Since the registrar or his appointee will be exercising a statutory power of decision, the Statutory Powers Procedure Act will govern the procedural aspects of the hearing.

4. A claimant may make an application to the District Court in two circumstances:

(a) Where the registrar fails to determine a claim for compensation within the ninety-day period, the District Court may order the payment of compensation (subsection (12)).

(b) Where the claimant does not accept the decision of the registrar or his appointee after a hearing is held, the District Court may set aside the decision and make an order for the payment of compensation (subsection (13)).

5. Since a claimant may not become aware of an error or omission and the resultant loss or damage until a number of years after a certificate is obtained, the Committee proposes that the limitation period should be altered to permit a claim to be made within one year from the time that the loss or damage comes, or should have come, to the claimant's knowledge. It is reasonable that once a claim has been settled or determined, no additional proceedings should be allowed to be commenced under the Proceedings Against the Crown Act and this is provided for under subsection (15).

6. A multiplicity of proceedings will be avoided under subsection (6), which provides for a form of class action where a claim is made by a trustee on behalf of all the holders of debt obligations issued, guaranteed or provided for under a security agreement.

7. Subsection (16) provides that where compensation is paid to a claimant under this section, the registrar is subrogated to the rights of the claimant. The creation of a right of subrogation is a necessary provision. A similar right of subrogation is contained in s. 53(11) of the Saskatchewan Act.

8. Subsection (17) gives the registrar the discretion to require a claimant to exhaust the claimant's remedies against the collateral, the debtor and any guarantor before entitlement to compensation is determined. The Assurance Fund will be liable for the reasonable costs, including solicitor and client costs, incurred by the claimant in pursuing available legal remedies. Subsection 60(4) of the Land Titles Act contains a similar precondition to the payment of compensation out of the Land Titles Assurance Fund.

Registration of financing statement

45. (1) In order to perfect a security interest by registration under this Act, a financing statement shall be registered. R.S.O.1980,c.375,s.47(1), *amended.*

Consumer goods

(2) Where the collateral is consumer goods, the financing statement referred to in subsection (1) shall not be registered before the execution of the security agreement and, where a financing statement is registered in contravention of this subsection, the registration of the financing statement does not constitute registration or perfection under this Act.

Collateral other than consumer goods

(3) Where the collateral is not consumer goods, the financing statement referred to in subsection (1) may be registered before or after the execution of a security agreement.

Subsequent security agreements

(4) Except where the collateral is consumer goods, one financing statement may perfect one or more security interests created or provided for in one or more security agreements between the parties. *New.*

COMMENTARY

This section corresponds to s. 47 of the present Act but incorporates some fundamental changes in the registration system. The most important changes are the following:

(a) The original concept of notice filing was that for registration purposes a financing statement was a substitute for document registration. Once notice has been publicly provided by registration in an appropriate form, it is effective for all subsequent transactions between the same parties. Consistent with this view, the Ontario Supreme Court held in ***Re West Bay Sales Ltd. and Hitachi Sales Corp. of Canada*** *(1978), 20 O.R. (2) 752, 88 D.L.R. (3d) 743 that the registration of one financing statement relating to a general security agreement covering the debtor's inventory was effective to cover all subsequent conditional sales contracts between the parties. It is the view of the Committee that the Act should be amended to reinforce this interpretation. It will have the additional advantage of reducing the number of identical registrations. However, it was considered that the concept should not be extended to consumer goods.*

(b) Subsections (2) and (3) deal with the time within which the registration of a financing statement may take place. It should be noted that no longer will registration be required to be made within thirty days after execution of the security agreement. Except in the case of consumer goods, a financing statement may be registered at any time before or after the execution of a security agreement. A registration relating to consumer goods may only be made after execution of the security agreement. See also s. 20(4) of the Draft Act and the related commentary.

Place of registration

46. (1) A financing statement or financing change statement to be registered under this Act may be tendered for registration,

(a) by delivery to any branch office; or

(b) by mail addressed to an address fixed by the regulations. R.S.O.1980,c.375,s.46,*amended.*

Form

(2) Every financing statement and financing change statement to be registered under this Act shall be in the prescribed form.

Classification of collateral

(3) Except with respect to rights to proceeds, where a financing statement or financing change statement sets out a classification of collateral and also contains words that appear to limit the scope of the classification, then, unless otherwise indicated in the financing statement or financing change statement, the secured party may claim a security interest perfected by registration only in the class as limited. *New.*

COMMENTARY

1. *This section replaces s. 46 of the present Act. Subsection (1) has been amended to delete the reference to the effective time of a registration as this matter is dealt with in ss. 51 and 53.*

2. *Subsection (2), a new subsection, is self-explanatory.*

3. *Subsection (3), which is also a new provision, is concerned with the collateral description set out in a financing statement or financing change statement. If a secured party chooses to provide a detailed description of the collateral, it will be bound by the description. The*

subsection does not permit the secured party to claim a perfected security interest in other collateral of the same class or type that has not been included in the detailed collateral description, unless otherwise indicated on the statement. An exception has been made in the case of proceeds. The underlying policy is that persons carrying out searches should be able to rely on the information recorded in the registration system. Under the present Act persons reviewing a search report will often rely on the more particular description and may assume to their detriment that it is a complete description of collateral claimed by the secured party (e.g., "all trucks" in the case of a claim involving inventory or equipment of the debtor when in fact the security agreement may also include tractors, trailers and spare parts).

Assignment of security interest

47. (1) Where a security interest is perfected by registration and the secured party has assigned or partially assigned the secured party's interest, a financing change statement may be registered. R.S.O.1980,c.375,s.48(1),*amended.*

Idem

(2) Where a security interest has not been perfected by registration and the secured party has assigned the secured party's interest, a financing statement referred to in section 46 may be registered,

(a) naming the assignor as the secured party and subsection (1) applies; or

(b) naming the assignee as the secured party and subsection (1) does not apply. R.S.O.1980,c.375,s.48(2),*amended.*

Idem

(3) Upon the registration of the financing change statement under subsection (1) or the financing statement under subsection (2), the assignee becomes a secured party of record. R.S.O.1980,c.375,s.48(3).

COMMENTARY

1. *This section makes only minor amendments to s. 48 of the present Act. Subsection 48(1) provides for the registration of a financing change statement recording the assignment of the entire interest of the secured party. The proposed subsection (1) will expressly permit the recording of a partial assignment by a secured party. A secured party may assign its entire interest in part of the collateral or part of its interest in all of the collateral. For example, a half interest could be assigned to a spouse or business partner.*

2. *Subsection (2) has been amended to permit the assignor to be shown as the secured party on a financing statement to accommodate any registrant who wishes to record the assignor's name first and then register notice of the assignment.*

Transfer of collateral

48. (1) Where a security interest is perfected by registration and the debtor with the consent of the secured party transfers all or part of the debtor's interest in all or part of the collateral, the security interest in the collateral transferred becomes unperfected unless the secured party registers a financing change statement within fifteen days of the time the secured party consents to the transfer. R.S.O.1980,c.375,s.49(1),*amended.*

Idem

(2) Where a security interest is perfected by registration and the secured party learns that,

(a) the debtor has transferred all or part of the debtor's interest in all or part of the collateral; or

(b) the name of the debtor has changed,

the security interest in the collateral transferred, where clause (a) applies, or the collateral, where clause (b) applies, becomes

unperfected fifteen days after the secured party learns of,

(c) the transfer and the information required to register a financing change statement; or

(d) the change of name and the new name of the debtor,

as the case may be, unless the secured party registers a financing change statement or takes possession of the collateral within such fifteen days. R.S.O.1980,c.375,s.49(2),*amended*.

Idem

(3) Where the debtor's interest in all or part of the collateral is transferred by the debtor without the consent of the secured party and there is one or more subsequent transfers of the collateral without the consent of the secured party before the secured party learns of the name of the transferee who has possession of the collateral, the secured party shall be deemed to have complied with subsection (2) if the secured party registers a financing change statement within fifteen days of learning of the name of the transferee who has possession of the collateral and the information required to register a financing change statement and the secured party need not register financing change statements with respect to any intermediate transferee. *New*.

Financing change statement

(4) A security interest that becomes unperfected under subsection (1) or (2) may be perfected again by registering a financing change statement at any time during the remainder of the unexpired registration period of the financing statement or any renewal thereof. R.S.O.1980,c.375,s.49(3),*amended*.

COMMENTARY

1. *This section is a revised version of s. 49 of the present Act. Section 49 does not state whether a registration is mandatory when a debtor transfers its interest in only part of the collateral. Some solicitors have expressed concern that the security interest will become unperfected if the secured party fails to register a financing change statement recording the transfer. The justification for recording partial transfers is the same as that for complete transfers (i.e., to protect persons dealing with the transferee). The Committee proposes that subsections (1) and (2) be amended to require that transfers of part of the collateral be recorded on a financing change statement with the sanction that the security interest in only the transferred collateral will become unperfected on the expiry of the fifteen-day period.*

2. *A series of unauthorized transfers may occur before the secured party acquires knowledge of the debtor's actions. See especially* **Zuker** *v.* **Paul** *(1982), 37 O.R. (2d) 161, 135 D.L.R. (3d) 481, discussed in (1982-83), 7 C.B.L.J. 338. Only persons dealing with the last transferee need to be protected and it is often difficult to obtain information on intermediate transferees. It is the Committee's view that secured parties should only be obliged to reperfect their security interest in relation to the last or current transferee who has possession of the collateral. Subsection (3), a new provision, is intended to implement this policy.*

3. *A security interest that becomes unperfected under subsections (1) and (2) (due to the failure of the secured party to record a change of debtor name or transfer by debtor or to take possession of the collateral within the relevant fifteen-day period) may thereafter be perfected by registering a financing change statement as long as the registration of the financing statement is still effective. Although under the present Act the security interest may become perfected under s. 49(3), there may still be a loss of priority pursuant to s. 53(1)(d) to persons who acquired rights in the collateral by an act or thing done during the period of deemed unperfection. While recognizing that a greater onus is being imposed on*

a secured party, nevertheless the Committee recommends that s. 53(1)(d) be deleted in order to give secured parties an additional incentive to keep the information in the registration system up-to-date and to maintain the integrity of the system. A reperfected security interest will no longer be back-dated to the date of the original registration, which may result in a loss of priority to the competing interests of third parties. For example, a secured party (SP1) with a perfected security interest will have priority over a second secured party (SP2), which subsequently registers and perfects its security interest. If SP1's security interest then becomes unperfected because of a failure to record a change of debtor name or transfer by debtor within the required fifteen-day period, SP1 will rank behind SP2 under the proposed amendment. Under the current law SP1 would maintain its priority over SP2 by registering a financing change statement pursuant to s. 49(3). Cf. ***Re Triad Financial Services and Thaler Metal Industries Ltd.*** *(1979), 24 O.R. (2d) 423, 98 D.L.R. (3d) 55; affd. 27 O.R. (2d) 506 (C.A.) and the discussion in (1979), 4 C.B.L.J. 54 at 84-88.*

Amendments

49. A financing change statement may be registered at any time during the period that a registration is effective,

(a) to correct a defect, irregularity, omission or error in a registered financing statement or financing change statement; or

(b) to amend a registered financing statement or financing change statement where the amendment is not otherwise provided for in this Part. *New.*

COMMENTARY

Section 50 of the present Act has been replaced by s. 49 of the Draft Act. Section 50 has been the subject of criticism of the grounds that it unduly limits the type of amendments that may be recorded on a financing change statement. Under it only errors or omissions of a clerical nature in a financing statement or financing change statement may be corrected. The Committee proposes that s. 49 should be broader in scope than s. 50 in order that any error or omission may be corrected. Thus if an amendment is not provided for in any other provision, it may be recorded by registering a financing change statement under this section. Section 49 is very similar to s. 44 of the Uniform Act, although there are differences in drafting style.

Subordination of security interest

50. Where a security interest is perfected by registration and the interest of the secured party has been subordinated by the secured party to any other security interest in the collateral, a financing change statement may be registered at any time during the period that the registration of the subordinated interest is effective. R.S.O.1980,c.375,s.51.

COMMENTARY

This section is substantially the same as s. 51 of the present Act. It provides for the registration of a financing change statement recording the subordination of the interest of the secured party of record to the interest of another person. See also s. 38 of the Draft Act.

Effective period of registration

51. (1) Subject to subsection (2), the registration of a financing statement is effective from the time assigned to the registration by the registrar or branch registrar until the end of the expiration date set out in the financing statement.

Idem

(2) Where the collateral,

(a) includes consumer goods, the expiration date set out in a financing statement shall not be a date that is later than the fifth anniversary of the date of registration;

(b) does not include consumer goods, the expiration date set out in the financing statement shall not be a date that is later than the seventy-fifth anniversary of the date of registration. *New.*

COMMENTARY

1. *This section replaces s. 53(1)(a) of the present Act.*

2. *The Committee recommends that the following fundamental changes be made to this section:*

   (a) *Registration will no longer constitute notice of a security interest. It is the view of the Committee that the concept of constructive notice is not required because the Act spells out the consequences of registration (e.g., see s. 33 of the Draft Act). Prior actual notice or knowledge of a competing claim is not relevant to the determination of priorities (see* ***Robert Simpson Co. v. Shadlock*** *(1981), 31 O.R. (2d) 612, 119 D.L.R. (3d) 417). The references to notice in ss. 47(4) and 49(2) of the present Act have been deleted from the corresponding sections of the Draft Act.*

   (b) *The concept of a variable registration period has been introduced. This was done for the following reasons, (i) it allows the secured party to select a registration period that coincides with the term of the agreement. Thus, when the secured obligation is satisfied in the normal course, the registration will expire and be removed from the computer file; (ii) it makes the concept of mandatory discharge of a consumer goods registration more palatable because the only time it will be necessary to discharge a registration is when the loan has been paid in advance, (iii) it accommodates corporation securities by relieving the trustee of the obligation of having to renew the registration every three years.*

   (c) *The maximum length of a registration is seventy-five years except for consumer goods registrations where there is a five-year maximum period (a security agreement relating to consumer goods usually has a much shorter term). The creation of a variable registration period with these maximum time periods eliminates the need for a perpetual registration period. A perpetual registration period was considered impractical.*

Renewal of registration

52. (1) Where a security interest has been perfected by registration, the registration may be renewed before the expiration of the registration period by the registration of a financing change statement.

Reperfection

(2) Where a security interest has been perfected by registration and the registration has expired, the security interest may be perfected again by the registration of a financing statement. R.S.O.1980,c.375,s.52, *amended.*

COMMENTARY

1. *This section corresponds to s. 52 of the present Act. If the variable registration period is adopted, there will still be circumstances in which it will be necessary to renew a registration. For example, a secured party may set out in error a premature expiration date or the parties may later agree to extend the original term of the security agreement before or after the expiration of the registration period.*

2. *If a registration lapses due to the failure to renew prior to the end of the expiration date, the security interest will become unperfected. The effect of a lapsed registration and a late renewal is now dealt with under s. 53(1)(c) of the present Act, which provides that there is a loss of priority to any person who acquired rights in the collateral by an act or thing done during the time the security interest was unperfected (the time between the expiry of the initial registration and the registration of the late renewal statement). The Committee recommends that s. 53(1)(c) be deleted from the Draft Act. The reasons for this change are set out in the commentary on s. 48 of the Draft Act.*

Effect of financing change statement

53. (1) Registration of,

(a) a financing change statement under subsection 52(1) extends, subject to subsection (2), the effect of the registration of the financing statement to which it refers until the end of the expiration date set out in the financing change statement; and

(b) any other financing change statement is effective during the remainder of the period for which the registration of the financing statement to which it refers is effective.

Limitation

(2) Where the collateral,

(a) includes consumer goods, the expiration date set out in a financing change statement to be registered under subsection 52(1) shall not be a date that is later than the fifth anniversary of the date of registration;

(b) does not include consumer goods, the expiration date set out in the financing change statement shall not be a date that is later than the seventy-fifth anniversary of the date of registration. *New.*

COMMENTARY

1. *This section replaces the major part of s. 53 of the present Act (see also s. 51 of the Draft Act and the related commentary).*

2. *The section provides the rules for the effective period of registration of financing change statements. A renewal statement extends the registration until the end of the expiration period set out in the financing change statement (a five-year maximum period where the collateral includes consumer goods; seventy-five years for other collateral). Any other financing change statement is effective during the remainder of the period for which the registration of the financing statement to which it refers is effective.*

3. *The special priority rules in s. 53(1)(c) and (d) of the present Act concerning late renewals, transfers by debtors and changes of debtor names have been deleted from the Draft Act in order to place a greater onus on secured parties to register the required financing change statement as soon as possible, which will ensure that the information in the registration system is up-to-date. See the commentary on s. 48 of the Draft Act.*

Notice in land registry office

54. (1) A notice of security interest, in the prescribed form, may be registered in the proper land registry office, where,

(a) the collateral is or includes fixtures or goods that may become fixtures or crops, or minerals or hydrocarbons to be extracted, or timber to be cut; or

(b) the security interest is a security interest in a right to payment under a lease, mortgage or charge of real property to which this Act applies. 1981,c.58,s.4.

Consumer goods, registration period

(2) Where the collateral is consumer goods, a notice registered under clause (1)(a) or an extension notice registered under subsection (3), as the case may be, shall set out an expiration date, which date shall not be later than the fifth anniversary of the date of registration and the notice or extension notice is effective until the end of the expiration date.

Idem

(3) A registration to which subsection (2) applies may be extended before the end of the registration period by the registration of an extension notice and the registration of an extension notice extends the registration period of the notice.

Discharge

(4) A notice registered under subsection (1) may be discharged or partially discharged by a certificate in the prescribed form and the certificate may be registered in the proper land registry office.

Effect of registration

(5) Where a notice has been registered under subsection (1), every person dealing with the collateral shall be deemed for the purposes of subsection 34(2) to have knowledge of the security interest. R.SO.1980,c.375,s.54(2,3),*amended*.

Loss of claim

(6) Where the collateral is consumer goods and the expiration date set out in a notice registered under clause (1)(a) has passed and an extension notice has not been registered or has expired, the land described in the notice is not affected by any claim under the notice but this subsection does not prevent the registration of a new notice under clause (1)(a). *New*.

COMMENTARY

1. *Section 54 provides for the registration of a notice of security interest in the land registry office. A problem has arisen because the notice of security interest in fixtures and the notice of conditional sales contract, which was registered under the predecessor legislation, have an unlimited registration period. A number of these notices have not been discharged even though all the obligations under the security agreement were fulfilled years ago. The landowner often does not become aware of the registration until it is time to sell the land.*

2. *This section contains a solution to the problem. A secured party will be required to choose an expiration date for the notice, which may not exceed five years, where the collateral is consumer goods. An extension notice can be registered prior to the expiration date of the original notice, and it will have the same maximum registration period. Wnen the registration of a notice lapses because of a failure to renew, or the expiry of an extension notice, the land will not be affected by any claims based on the notice.*

3. *Clause 54(1)(b) of the present Act has been amended to expressly permit the registration in the land registry office of a prescribed form of notice of security interest in a right to payment under a lease of real property to which this Act applies.*

4. *Subsection 54(2) of the Act makes a cross-reference to s. 36(2) and uses the term "actual notice". The Committee has decided to remove the term "notice" from the Act and replace tne words "actual notice" in s. 36(2) with the word "knowledge". A complementary amendment has been made to subsection (4).*

Discharge or partial discharge of registration

55. Where a security interest perfected by registration is released or partially released, the registration may be discharged or partially discharged by the registration of a financing change statement discharging or partially discharging the registration. R.S.O.1980,c.375,s.55(1),*amended*.

COMMENTARY

1. *This section is an amended version of s. 55(1) of the present Act.*

2. *A reference to the release of the collateral or proceeds has been deleted as it is more accurate to speak of the release or partial release of the security interest as the precondition for the discharge or partial discharge of a registration.*

3. Subsection 55(2) of the present Act, which required all assignments by a secured party to be registered prior to the registration of the discharge statement, has been deleted from the Draft Act. The original purpose of this requirement was to ensure that the complete chain of title was recorded in the registration system. The Committee believes that this precondition to discharging a registration is unnecessary. This proposal will simplify the discharge process.

Demand for discharge, where security interest existed

56. (1) Where a financing statement or notice of security interest is registered under this Act, and,

(a) all the obligations under a security agreement to which it relates have been performed; or

(b) it is agreed to release part of the collateral covered by a security agreement to which it relates upon payment or performance of certain of the obligations under the security agreement, then upon payment or performance of such obligations,

any person having an interest in the collateral covered by the security agreement may deliver a written notice to the secured party demanding a financing change statement referred to in section 55 or a certificate of discharge or partial discharge referred to in subsection 54(4), or both, and the secured party shall sign and give to the person demanding it, at the place set out in the notice, the financing change statement or the certificate of discharge or partial discharge, or both, as the case may be.

Idem, where no security interest acquired

(2) Where a financing statement or notice of security interest is registered under this Act and the person named in the financing statement or notice as the secured party has not acquired a security interest in the property to which the financing statement or notice relates, any person having an interest in the property may delivery a written notice to the person named as the secured party demanding a financing change statement referred to in section 55 or a certificate of discharge referred to in subsection 54(4), or both, and the person named as the secured party shall sign and give to the person demanding it, at the place set out in the notice, the financing change statement or the certificate of discharge, or both, as the case may be.

Interpretation

(3) For the purposes of subsections (4) and (5), "secured party" includes a person named in a financing statement or notice of security interest as secured party to whom subsection (2) applies.

Failure to deliver

(4) Where the secured party, without reasonable excuse, fails to deliver the financing change statement or certificate of discharge or partial discharge, or both, as the case may be, required under subsection (1) or (2) within ten days after receipt of a demand therefor, the secured party shall pay $100 to the person making the demand and any damages resulting from the failure, which sum and damages are recoverable in any court of competent jurisdiction.

Security or payment into court

(5) Upon application to the District Court, the court may,

(a) allow security for payment into court of the amount claimed by the secured party and such costs as the court may fix, and thereupon order the secured party to discharge or partially discharge, as the case may be, the registration of the financing statement or notice of security interest; or

(b) order upon any ground that the court considers proper that,

(i) the registrar amend the information recorded in the central file of the registration system to indicate that the registration of the financing statement has been discharged or partially discharged, as the case may be, or

(ii) the land registrar delete any entry in the books of the land registry office related to the notice of security interest or that the land registrar amend the books of the land registry office to indicate that the security interest has been discharged or partially discharged, as the case may be. *New.*

COMMENTARY

1. *This section replaces ss. 55(2) to (5) of the Act.*

2. *Subsection (1) has been amended so as to relieve the secured party from supplying the debtor with financing change statements recording assignments and transfers by debtor in response to a demand for a discharge statement. It was noted in the commentary on s. 55 of the Draft Act that a similar amendment has been made to that section by the deletion of s. 55(2) of the Act. This proposal will simplify the discharge process by eliminating the registration of unnecessary statements.*

3. *Subsection (2) is a new subsection. Since financing statements may be registered before the execution of a security agreement, there will be circumstances in which a registration is made setting out a person's name as debtor but no security interest is ever acquired by the person claiming to be the secured party. A similar problem could also occur if a notice of security interest is erroneously registered in the land registry office in contemplation of the execution of a security agreement. Subsection (2) permits any person having an interest in the collateral to serve a written demand on the person named as the secured party, requiring that person to sign and deliver a financing change statement or certificate of discharge discharging the registration. The remedies for failure to deliver the discharge statement in subsections (4) and (5) are applicable to a subsection (2) demand.*

4. *The commentary on s. 54 indicated that secured parties have occasionally neglected to discharge or partially discharge a notice of security interest registered in the land registry office. If a secured party fails to respond to a demand to deliver the certificate of discharge, it will be subject to a cause of action for damages under subsection (4) and a court application to delete the entry in the records of the land registry office under subsection (5).*

Consumer goods, duty of secured party to register or provide discharge

57. (1) Within thirty days after all the obligations under a security agreement that creates a security interest in consumer goods have been performed or forgiven, the secured party shall register or give to the debtor,

(a) a financing change statement discharging the registration if the security interest has been perfected by registration; and

(b) a certificate of discharge, if a notice of security interest has been registered under section 54.

Failure to register

(2) Where a secured party fails to comply with subsection (1), the secured party shall, on written notice from the debtor, pay the debtor $100 and any damages resulting from the failure, which sum and damages are recoverable in any court of competent jurisdiction.

Rights not affected

(3) Subsections (1) and (2) do not affect any rights under section 56 of the debtor or of any other person having an interest in the collateral. *New.*

COMMENTARY

1. *Section 57, a new section, imposes an obligation on secured parties to either discharge a registration relating to consumer goods within thirty days after all the obligations under the*

security agreement have been performed or forgiven or give a discharge statement to the debtor within that time period. The same provision is found in s. 48(1) of the Uniform Act and s. 53(7) of the Manitoba Act. This consumer protection measure is intended to benefit the unsophisticated consumer who is not aware of the requirement to serve a written demand on the secured party in order to obtain a copy of the discharge statement upon the release of the security interest (e.g., the collateral is often a motor vehicle).

2. *The introduction of variable registration periods will permit a secured party to select a registration period that coincides with the term of the security agreement, i.e., the registration will expire automatically if the debt is paid in the normal course. As a consequence, registration of a discharge becomes the exception rather than the norm.*

PART V

DEFAULT - RIGHTS AND REMEDIES

Application of Part

58. This Part applies only to a security interest that secures payment or performance of an obligation. *New.*

COMMENTARY

This section provides that Part V of the Draft Act will not apply to pure leases and consignments and absolute transfers of accounts and chattel paper. The reason is that they are not true security agreements and Part V is only intended to apply to default proceedings involving true security agreements.

Rights and remedies of secured party

59. (1) Where the debtor is in default under a security agreement, the secured party has, in addition to any other rights and remedies,

(a) the rights and remedies provided in the security agreement;

(b) the rights and remedies provided in this Part,

and when in possession of the collateral, the rights, remedies and duties provided in section 17.

Enforcement by secured party

(2) The secured party may enforce the security interest by any method permitted by law and, if the collateral is or includes documents of title, the secured party may proceed either as to the documents of title or as to the goods covered thereby, and any method of enforcement that is permitted with respect to the documents of title is also permitted, with necessary modifications, with respect to the goods covered thereby. R.S.O.1980,c.375,s.56(2,3),*amended.*

Rights and remedies of debtor

(3) Where the debtor is in default under a security agreement, the debtor has, in addition to the rights and remedies provided in the security agreement and any other rights and remedies, the rights and remedies provided in this Part and in section 17. R.S.O.1980,c.375,s.56(4).

Determination of standards

(4) Subject to subsection (5), a security agreement may set out the standards by which the rights of the debtor and the duties of the secured party are to be measured, so long as those standards are not manifestly unreasonable having regard to the nature of the rights and duties. R.S.O.1980,c.375,s.56(5),*amended.*

Non-waiver of rights and duties

(5) Notwithstanding clause (1)(a), the provisions of section 17, and sections 63 to 67, to the extent that they give rights to the debtor and impose duties upon the secured party, shall not be waived or varied except as provided by this Act. R.S.O.1980,c.375,s.56(5), *amended.*

Where agreement covers both real and personal property

(6) Where a security agreement covers both real and personal property, the secured party may proceed under this Part as to the personal property or may proceed as to both the real and the personal property in accordance with the secured party's rights and remedies in respect of the real property, in which case this Part does not apply. R.S.O. 1980,c.375,s.56(6).

No merger in judgement

(7) A security agreement does not merge merely because the claim has been reduced to judgment by the secured party or because the secured party has levied execution thereunder on the collateral. R.S.O.1960,c.375,s.56(7),*amended*.

Rights and remedies cumulative

(8) The rights and remedies mentioned in this Part are cumulative. R.S.O.1980,c.375,s.56(1).

COMMENTARY

1. *This section is based on s. 56 of the present Act. For ease of reading, subsection (1) has been amended to conform with the wording of s. 55(2) of the Uniform Act.*

2. *Subsection 56(5) of the present Act has been divided into two subsections (subsections (3) and (4) for ease of reading and to conform with the wording of ss. 55(3) and (4) of the Uniform Act.*

3. *Subsection (7) has been amended by the addition of the words "or levied execution thereunder on the collateral" to the end of the subsection in order to preserve the secured party's priority as against other execution creditors. This extension of the concept of non-merger of the security interest is consistent with the policy underlying s. 55(7) of the present Act.*

Receivers and receiver-managers

60. (1) Nothing in this Act prevents,

(a) the parties to a security agreement from agreeing that the secured party may appoint a receiver or receiver-manager and, except as provided by this Act, determining the rights and duties of the receiver or receiver-manager by agreement; or

(b) a court of competent jurisdiction from appointing a receiver or receiver-manager and determining rights and duties of the receiver or receiver-manager by order.

Interpretation

(2) For the purposes of this Part and section 17, where a receiver or receiver-manager has been appointed by the secured party or the court, "secured party" includes the receiver or receiver-manager. *New*.

COMMENTARY

1. *This section is a new provision which deals with the status of receivers and receiver-managers under the Act. Subsection (1) states that no provision of the Act prevents the appointment of a receiver by a secured party pursuant to the terms of a security agreement or by a court of competent jurisdiction. This principle is reflected in the decision of the Ontario Supreme Court in* **Cantamar Holdings Ltd. v. Tru View Aluminum Products** *(1979), 23 O.R. (2d) 572, 6 B.L.R. 209.*

2. *Subsection (2) expands the definition of "secured party" to include a receiver or receiver-manager for the purposes of Part V and s. 17. Where the receiver disposes of collateral out of the ordinary course of business, he will be subject to the notice, sale and other requirements of Part V. Under s. 63(6)(g) of the Draft Act, however, an exception to the notice requirement is made where the receiver-manager continues to operate the business and sell collateral in the ordinary course of business. It may be commercially reasonable, indeed essential, for a receiver-manager to operate the business until a purchaser for the entire business is found or all the collateral is disposed of. See also s. 67(1)(f) of the Draft Act, which empowers a court to remove or replace a receiver-manager who is guilty of misconduct in order to protect persons who have an interest in the collateral.*

Collection rights of secured party

61. (1) Where so agreed and in any event upon default under a security agreement, a secured party is entitled,

(a) to notify any person obligated on an account or on chattel paper or any obligor on an instrument to make payment to the secured party whether or not the assignor was theretofore making collections on the collateral; and

(b) to take control of any proceeds to which the secured party is entitled under section 25.

Idem

(2) A secured party who by agreement is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor and who undertakes to collect from a person obligated on an account or on chattel paper or an obligor on an instrument shall proceed in a commercially reasonable manner and the secured party may deduct the reasonable expenses of realization from the collections. R.S.O.1980,c.375,s.57,*amended*.

COMMENTARY

This section corresponds to s. 57 of the present Act.

Possession upon default

62. Upon default under a security agreement,

(a) the secured party has, unless otherwise agreed, the right to take possession of the collateral by any method permitted by law;

(b) if the colleral is equipment and the security interest has been perfected by registration, the secured party may, in a reasonable manner, render such equipment unusable without removal thereof from the debtor's premises, and the secured party shall thereupon be deemed to have taken possession of such equipment; and

(c) the secured party may dispose of collateral on the debtor's premises in accordance with section 63.
R.S.O.1980,c.375,s.57,*amended*.

COMMENTARY

This section is derived from s. 58 of the present Act. A small drafting change has been made to clause (c). The words "in accordance with the section 63" have been substituted for "under section 59" to reflect the change in the numbering of the appropriate section.

Disposal of collateral

63. (1) Upon default under a security agreement, the secured party may dispose of any of the collateral in its condition either before or after any commercially reasonable repair, processing or preparation for disposition, and the proceeds of the disposition shall be applied consecutively to,

(a) the reasonable expenses of retaking, holding, repairing, processing, preparing for disposition and disposing of the collateral and, to the extent provided for in the security agreement, any other reasonable expenses incurred by the secured party; and

(b) the satisfaction of the obligation secured by the security interest of the party making the disposition,

and the surplus, if any, shall be dealt with in accordance with section 64. R.S.O.1980,c.375,s.59(1),*amended*.

Methods of disposition

(2) Collateral may be disposed of in whole or in part, and any such disposition may be by public sale, private sale, lease or otherwise and, subject to subsection (4), may be made at any time and place and on any terms so long as every aspect of the disposition is commercially reasonable. R.S.O.1980,c.375,s.59(3).

Secured party's right to delay disposition of collateral

(3) Subject to subsection 65(1), the secured party may delay disposition of all or part of the collateral for such period of time as is commercially reasonable. R.S.O.1980,c.375,s.59(4),*amended*.

Notice required

(4) Subject to subsection (6), the secured party shall give not less than fifteen days notice in writing of the matters described in subsection (5) to,

(a) the debtor and any other person who is known by the secured party, before the date that the notice is served on the debtor, to be the owner of the collateral;

(b) every person who has a security interest in the collateral that is subordinate to that of the secured party and whose interest,

(i) was perfected by possession, the continuance of which was prevented by the secured party who has taken possession of the collateral, or

(ii) is perfected by registration before the date the notice is served on the debtor;

(c) every person with an interest in the collateral who has delivered a written notice to the secured party of the interest in the collateral before the date that the notice is served on the debtor.

Contents of notice

(5) The notice mentioned in subsection (4) shall set out,

(a) a brief description of the collateral;

(b) the amount required to satisfy the obligation secured by the security interest;

(c) the amount of the applicable expenses referred to in clause (1)(a) or, in a case where the amount of such expenses has not been determined, a reasonable estimate thereof;

(d) a statement that upon receipt of payment the payor will be credited with any rebates or allowances to which the debtor is entitled by law or under the agreement;

(e) a statement that upon payment of the amounts due under clauses (b) and (c), any person entitled to receive notice may redeem the collateral;

(f) a statement that unless the amounts due are paid the collateral will be disposed of and the debtor may be liable for any deficiency; and

(g) the date, time and place of any public sale or the date after which any private disposition of the collateral is to be made.

Notice not required

(6) The notice mentioned in subsection (4) is not required where,

(a) the collateral is perishable;

(b) the secured party believes on reasonable grounds that the collateral will decline speedily in value;

(c) the collateral is of a type customarily sold on a recognized market;

(d) the cost of care and storage of the collateral is disproportionately large relative to its value;

(e) for any reason not otherwise provided for in this subsection, the District Court, on an application made without notice to any other person, is satisfied that a notice is not required or should be abridged;

(f) after default, every person entitled to receive a notice of disposition under subsection (4) consents in writing to the immediate disposition of the collateral; or

(g) a receiver-manager disposes of collateral in the course of carrying on the business of the debtor. *New.*

Secured party's right to purchase collateral

(7) The secured party may purchase the collateral or any part thereof only at a public sale unless the District Court, on application, orders otherwise. R.S.O.1980,c.375,s.59(7),*amended.*

Effect of disposition of collateral

(8) Where collateral is disposed of in accordance with this section, the disposition discharges the security interest of the secured party making the disposition and, if the disposition is made to a purchaser who purchases in good faith for value, discharges also any subordinate security interest and terminates the debtor's interest in the collateral.

Idem

(9) Where collateral is disposed of by a secured party after default otherwise than in accordance with this section, then,

(a) in the case of a public sale, if the purchaser has no knowledge of any defect in the sale and if the purchaser does not purchase in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith,

the disposition discharges the security interest of the secured party making the disposition and, where the disposition is made to a purchaser for value, discharges also any subordinate security interest and terminates the debtor's interest in the collateral.

Certain transfers of collateral

(10) A person who is liable to a secured party under a guarantee, endorsement, covenant, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to the secured party's rights has thereafter the rights and duties of the secured party, and such a transfer of collateral is not a disposition of the collateral. R.S.O.1980,c.375,s.59(8-10).

COMMENTARY

This section is derived from s. 59 of the present Act and incorporates the following changes:

(a) One of the two limitations on recovery of reasonable expenses by a secured party has been deleted from clause 1(a). Since there appears to be no legislation denying recovery of reasonable expenses, the words "not prohibited by law" have been omitted.

(b) Subsection (3), which deals with the secured party's right to delay disposition of the collateral, has been revised to conform with the wording of s. 59(3) of the Saskatchewan Act.

(c) Subsection 59(5) of the present Act, which provides for 15 days notice of intended disposition of the collateral, has been divided into three subsections. Subsection (4) specifies the parties to whom the notice must be sent. Subsection 59(5) requires that notice be given to the debtor, other secured parties who have perfected their security interests by

registration, and any other person who is known by the secured party to have a security interest in the collateral. Clause 4(a) of the Draft Act requires that a notice must be sent to the debtor and any other person who is known by the secured party, before the date that the notice is served on the debtor, to be the owner of the collateral.

(d) Clause 4(b) provides that notice must be given to persons with subordinate security interests and need not be sent to prior secured parties. A secured party cannot alter the rights of a secured party who ranks ahead of him in priority; therefore notification is unnecessary. Two additional classes of subordinate secured parties will be entitled to notice in order to protect their rights: (a) a secured party who previously had a possessory security interest, but who was deprived of possession by the secured party who has taken possession and is making the disposition; and (b) a secured party whose security interest is perfected by registration.

(e) Clause 4(c) is a new provision intended to protect the rights of other persons with an interest in the collateral (e.g., an execution creditor). Such persons are entitled to receive the notice if they deliver a written notice of their interest to the secured party before the date that the notice of the disposition is served on the debtor.

(f) Subsection (5) sets out the mandatory contents requirements of the notice. Clause 5(d) has been added to the subsection. The notice must contain a statement that upon receipt of payment the payor will be credited with any rebates or allowances to which the debtor is entitled by law or under the agreement. Clause 5(e), derived from s. 59(5)(d) of the present Act, has been amended to provide that the notice must state that any person entitled to notice may redeem the collateral. See the provisions of s. 66 concerning the right of redemption.

(g) Subsection (6) enumerates the situations in which the notice is not required. Clauses 6(a) and (b) are derived from s. 59(5) of the present Act. Clause 6(c), which is derived from s. 9-504(3) of the Uniform Commercial Code, exempts a notice where the collateral is of a type customarily sold on a recognized market. Where there is a recognized market (e.g., margin purchases of securities), sales will occur at fair value and since the property is fungible, the debtor may purchase a substitute property on the market and will thus not be prejudiced by the sale of the collateral. Clauses 6(d), (e) and (f) are derived from s. 59(5) of the Saskatchewan Act. Clause 6(e) adds a measure of flexibility to the notice requirement. The secured party will be permitted to apply ex parte to a judge of the District Court to obtain an order either dispensing with the notice for reasons not specified in subsection (6) or abridging the 15-day notice period. The final exemption in clause 6(g) applies to a receiver-manager who disposes of collateral in the course of carrying on the business of the debtor. See the commentary on s. 60 of the Draft Act.

(h) Subsection (7) is derived from s. 59(7) of the present Act. A secured party will be permitted to purchase the collateral at the private sale where permitted by a judge of the District Court. This provision adds a measure of flexibility subject to court control.

Distribution of surplus

64. (1) Where the secured party has dealt with the collateral under section 61 or has disposed of it, the secured party shall account for and, subject to subsection (4), pay over any surplus consecutively to,

(a) any person who has a security interest in the collateral that is subordinate to that of the secured party and whose interest,

(i) was perfected by possession, the continuance of which was prevented by the secured party who took possession of the collateral, or

(ii) was, immediately before the dealing or disposition, perfected by registration against the name of the debtor or against the vehicle identification number of the collateral if the number is required for registration;

(b) any other person with an interest in the surplus who has delivered a written notice to the secured party of the interest before the distribution of the proceeds; and

(c) the debtor or any other person who is known by the secured party to be the owner of the collateral,

but the priority of the claim of any person referred to in clauses (a), (b) and (c) against the recipient of the surplus shall not be prejudiced thereby. R.S.O.1980,c.375,s.60,*amended*.

Proof of interest

(2) The secured party may require any person mentioned in subsection (1) to furnish proof of that person's interest, and, unless the proof is furnished within ten days after demand by the secured party, the secured party need not pay over any portion of the surplus to the person.

Deficiency

(3) Unless otherwise agreed in the security agreement, or unless otherwise provided under this or any other Act, the debtor is liable for any deficiency.

Payment into court

(4) Where there is a question as to who is entitled to receive payment under subsection (1), the secured party may pay the surplus into the District Court and the surplus shall not be paid out except upon an application under section 67 by a person claiming an entitlement thereto. *New*.

COMMENTARY

1. *This section deals with the distribution of all proceeds of disposition other than those required to satisfy the security interest and expenses of the secured party making the disposition. It replaces ss. 59(1)(c), 59(2) and 60 of the present Act.*

2. *A distinction is made in subsection (1) between the obligation to distribute the surplus and the obligation to give notice of the application of the proceeds. The parties entitled to the surplus proceeds are the same parties which are entitled to receive a notice of disposition under 63(4) (see the commentary on s. 63). The concluding words of the subsection preserve the priority of the persons referred in clauses 1(a), (b) and (c) among themselves.*

3. *Subsection (2) permits a secured party to require claimants to the surplus to submit proof of their interest within ten days after a demand is made and relieves the secured party of the obligation to pay over if this is not done.*

4. *Subsection (3) is intended to resolve an important ambiguity in the present Act and to make it clear that the debtor remains liable for any deficiency after disposition of the collateral unless the security agreement or any legislation provides an exemption. The subsection does not create any new liability because a debt is not extinguished unless the security agreement expressly provides for its extinguishment.*

Compulsory disposition of consumer goods

65. (1) Where a security agreement secures an indebtedness and the collateral is consumer goods and the debtor has paid at least 60 per cent of the indebtedness secured and has not signed, after default, a statement renouncing or modifying the debtor's rights under this Part, the secured party who has taken possession of the collateral shall, within ninety days after taking possession, dispose of or contract to dispose of the collateral under section 63, and, if the secured party fails to do so, the debtor may proceed under section 67 or in an action for damages or loss sustained. R.S.O.1980,c.375,s.61(1).

Retention of collateral

(2) In any case other than that mentioned in subsection (1), a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation secured and shall serve a notice of the proposal on the persons mentioned in clauses 63(4)(a) to (c). R.S.O.1980,c.375,s.61(2),*amended*.

Objection

(3) If any person entitled to notification under subsection (2), whose interest in the collateral would be adversely affected by the secured party's proposal, delivers to the secured party a written objection within sixty days after service of the notice, the secured party shall dispose of the collateral in accordance with section 63. R.S.O.1980,c.375,s.61(3),*part,amended*.

Proof of interest

(4) The secured party may require any person who has made an objection to the proposal to furnish proof of that person's interest in the collateral and, unless the person furnishes the proof within ten days after demand by the secured party, the secured party may proceed as if no objection had been made.

Application to judge

(5) Upon application to the District Court by the secured party, and after notice to every person who has made an objection to the proposal, the court may order that an objection to the proposal of the secured party is ineffective because,

(a) the person made the objection for a purpose other than the protection of the person's interest in the collateral or in the proceeds of a disposition of the collateral; or

(b) the fair market value of the collateral is less than the total amount owing to the secured party and the estimated expenses recoverable under clause 63(1)(a). *New*.

Foreclosure

(6) If no effective objection is made, the secured party in possession is, at the expiration of the sixty-day period mentioned in subsection (3), deemed to have irrevocably elected to retain the collateral in full satisfaction of the obligation secured, and thereafter is entitled to hold or dispose of the collateral free from all rights and interests therein of any person entitled to notification under subsection (2) whose interest is subordinate to that of the secured party and who was served with such notice. R.S.O.1980,c.375,s.61(3),*part,amended*.

Effect of disposition

(7) When a secured party in possession disposes of the collateral after expiration of the period mentioned in subsection (6) to a buyer who buys in good faith for value and who takes possession of it, the buyer acquires the collateral free from any interest of the secured party and the debtor and free from every interest subordinate to that of the secured party, whether or not the requirements of this section have been complied with by the secured party. *New*.

COMMENTARY

1. *Subsection (2) is derived from s. 61(2) of the present Act. The subsection provides that in any case other than the one mentioned in subsection (1), notice of intention to retain the collateral in satisfaction of the obligation secured shall be given by the secured party to the same persons entitled to a notice of disposition under s. 63(4).*

2. *Subsection 61(3) of the present Act has been divided into four subsections (subsections 65(3) - (6) of the Draft Act):*

(a) Subsection (3) deals with an objection by a person entitled to notice and a consequent mandatory sale in accordance with s. 63. A further restriction has been added to the subsection. The objection can only be made by a person whose interest in the collateral would be adversely affected by the secured party's proposal. The time within which an objection may be made has been extended from fifteen to sixty days. The Committee is of the view that additional time is needed in the light of the many different types of collateral that may be involved and the need to protect adequately the interests of subordinate secured parties and general creditors against precipitous foreclosures.

(b) Subsection (4), which is similar to the wording of s. 64(2) of the Draft Act, is a new provision entitling a secured party to require proof of the interest of the objector.

(c) Subsection (5) gives a judge of the District Court express power to relieve against an unreasonable objection to a secured party retaining the collateral.

(d) Subsection (6) sets out the effect of retention of collateral without effective objection upon the expiry of the sixty-day period.

3. Subsection (7) is a new provision derived from s. 60(6) of the Uniform Act and 61(7) of the Saskatchewan Act. The subsection provides express protection for a bona fide purchaser for value from a secured party who has retained collateral, even if the requirements of the Act have not been complied with by the secured party. This would provide a parallel protection to that enjoyed by a purchaser under ss. 59(8) and (9) of the present Act (ss. 63(8) and (9) of the Draft Act) where a disposition has been made under that section.

Redemption of collateral

66. (1) At any time before the secured party, under section 63, has disposed of the collateral or contracted for such disposition or before the secured party, under subsection 65(6), shall be deemed to have irrevocably elected to retain the collateral, any person entitled to receive notice under subsection 63(4) may, unless the person has otherwise agreed in writing after default, redeem the collateral by tendering fulfilment of all obligations secured by the collateral together with a sum equal to the reasonable expenses referred to in clause 63(1)(a) incurred by the secured party, but if more than one person elects to redeem, the priority of their rights to redeem shall be the same as the priority of their respective interests under this Act. R.S.O.1980,c.375,s.62,*amended*.

Consumer goods, re-instatement

(2) Where the collateral is consumer goods, at any time before the secured party, under section 63 has disposed of the collateral or contracted for such disposition or before the secured party, under subsection 65(6) shall be deemed to have irrevocably elected to retain the collateral, the debtor may reinstate the security agreement by paying,

(a) the sum actually in arrears, exclusive of the operation of any acceleration clause, and by curing any other default which entitles the secured party to dispose of the collateral; and

(b) a sum equal to the reasonable expenses referred to in clause 63(1)(a) incurred by the secured party.

Limitation

(3) The right to reinstate under subsection (2) may not be exercised more than once during the term of the security agreement, unless the District Court, on the application of the debtor, orders otherwise. *New*.

COMMENTARY

1. Subsection (1), which deals with redemption of the collateral, is derived from s. 62 of the present Act. Instead of enumerating the parties entitled to exercise the right of redemption,

the section states that any person entitled to receive a notice of disposition under s. 63(4) may redeem the collateral. The reference to the reasonable expenses of the secured party has been considerably shortened by the use of a cross-reference to clause 63(1)(a). Where more than one person elects to redeem the collateral, the priority of their rights to redeem will be the same as the priority of their respective interests under the Act.

2. *Subsection (2) is a new provision. It allows a consumer debtor to reinstate the security agreement after default by paying the sum actually in arrears and the reasonable expenses incurred by the secured party.*

3. *Subsection (3) sets limits to the right to reinstate. The right must be enforced prior to the disposition or contracting for disposition of the collateral or the secured party's deemed irrevocable election to retain the collateral. It may not be exercised more than once during the term of the agreement unless the District Court orders otherwise. This provision is intended to allow an occasional or minor breach of the security agreement to be cured. Subsections (2) and (3) are based on s. 61(1) of the Uniform Act.*

Court orders and directions

67. (1) Upon application to the Supreme Court or to the District Court by a debtor, a creditor of a debtor, a secured party or any person who has an interest in collateral which may be affected by an order under this section, the court may,

(a) make any order, including binding declarations of right and injunctive relief, that is necessary to ensure compliance with this Part, section 17 or subsection 34(3) or 35(4);

(b) give directions to any party regarding the exercise of the party's rights or the discharge of the party's obligations under this Part, section 17 or subsection 34(3) or 35(4);

(c) make any order necessary to determine questions of priority or entitlement in or to the collateral or its proceeds;

(d) relieve any party from compliance with the requirements of this Part, section 17 or subsection 34(3) or 35(4), but only on terms that are just for all parties concerned;

(e) make any order necessary to ensure protection of the interests of any person in the collateral, including an order to remove or replace a receiver or receiver-manager however appointed, but only on terms that are just for all parties concerned; and

(f) subject to subsection (3), make an order requiring a secured party to make good any default in connection with the secured party's custody, management or disposition of the collateral of the debtor or to relieve the secured party from any default on such terms as the court considers just, and to confirm any act of the secured party. R.S.O.1980,c.375,s.63(1),*amended*.

Compensation for loss or damages

(2) Where a person fails to discharge any duties or obligations imposed upon the person by this Part, section 17 or subsection 34(3) or 35(4), the person to whom the duty or obligation is owed has a right to recover compensation for any loss or damage suffered because of the failure and which was reasonably foreseeable, and, where the collateral is consumer goods, the debtor has a right to recover in any event an amount equal to the greater of $200 or the actual loss or damages. R.S.O.1980,c.375,s.63(2),*amended*.

Void provisions

(3) Except as otherwise provided in this Act, any provision in any security agreement which purports to exclude any duty or obligation imposed under this Act or to exclude or limit liability for failure to discharge duties or obligations imposed by this Act is void. ***New***.

Removal into Supreme Court

(4) Where an application under subsection (1) is made to the District Court, a respondent, by notice served on the applicant and on the other respondents, if any, and filed with proof of service with the local registrar of the District Court at least two days before the hearing date of the application, may require the application to be removed into the Supreme Court. R.S.O.1980,c.375,c.63(3),*amended*.

Transmission of papers

(5) Upon the filing of the notice with proof of service, the local registrar of the District Court shall forthwith transmit the papers to the local registrar of the Supreme Court in the county or district in which the application was commenced, and the application shall continue as if it had commenced in the Supreme Court. R.S.O.1980,c.375,s.375,s.63(4-5), *amended*.

COMMENTARY

1. *Subsection 63(1) of the present Act contains limited rights of application to a court for an order directing compliance with s. 17 or Part V, and in particular it does not contemplate an application being made by a secured party. Subsection (1) is substantially based on s. 62 of the Uniform Act. It confers much broader powers on the courts and permits applications by a secured party. For example, an order may be made under clause 1(a) directing compliance with the fixture and accession provisions. Fixture and accession applications relate to a disposition upon default and are most appropriately dealt with under this subsection rather than under ss. 34 or 35 (see the commentary on those sections of the Draft Act). Clause 1(c) empowers a court to settle questions of priority or entitlement in or to the collateral or its proceeds. Clause 1(d) gives a court a new power to relieve parties from compliance with Part V and ss. 17, 34(3) and 35(4). Clause 1(f) permits a court to order the removal or replacement of a receiver or receiver-manager who has been guilty of misconduct prejudicial to persons with an interest in the collateral.*

2. *Subsection (2), which is based on s. 64(2) of the Uniform Act, permits a person to recover compensation for financial loss resulting from a breach of a duty or obligation imposed by Part V, and ss. 17, 34(3) and 35(4). The formula for assessment of damages where the collateral is consumer goods has been revised because some difficulty was experienced in interpreting s. 63(2)(b) of the present Act. The debtor will be entitled to recover in any event an amount equal to the greater of $200 or the actual loss or damages.*

3. *Subsecton (3) renders void any clause in the security agreement which purports to exclude the statutory duties or obligations imposed on a secured party or exclude or limit liability for non-compliance with them. Subsections (4) and (5) are derived from subsections 63(3) to (6) of the present Act.*

PART VI

MISCELLANEOUS

Service of notices, etc.

68. (1) Where under this Act a notice or any other document may be or is required to be given to or served on,

(a) a secured party named in a registered financing statement or financing change statement, the notice or document may be given to or served on the secured party by personal service or by registered mail at the most recent address of the secured party as shown in the financing statement or financing change statement; and

(b) a debtor by a secured party, the notice or document may be given to or served on the debtor by personal service or by registered mail at the last address of the debtor known to the secured party.

Idem

(2) Where under this Act a notice or any document may be or is required to be given to or served on a person, other than a person to whom subsection (1) applies, the notice or document may be given to or served on,

(a) an individual, by personal service or by registered mail addressed to the individual at his or her residence or place of business and, if the individual has more than one residence or place of business, at any one of the residences or places of business;

(b) a partnership,

(i) by personal service,

(A) upon any one or more of the partners, or

(B) upon any person having control or management of the partnership business at the principal place of business of the partnership, or

(ii) by registered mail addressed to,

(A) the partnership,

(B) any one or more of the general partners,

(C) any person having control or management of the partnership business,

at the principal address of the partnership;

R.S.O.1980, c.303

(c) a municipal corporation or a local board thereof, as defined in the *Municipal Affairs Act*, by delivery or registered mail addressed to the head of council or chairman or chief administrative officer of the municipal corporation or local board at its principal office;

(d) a corporation, other than a municipal corporation or a local board thereof,

(i) by serving any officer, director, or any agent thereof, or the manager or person in charge of any office or other place where the corporation carries on business, or

(ii) by registered mail addressed to the address of its registered or head office;

(e) upon Her Majesty in right of Ontario, unless the regulations otherwise provide, by delivery or registered mail addressed to the registrar at the central office of the registration system.

Out of province

(3) Where an individual, partnership or body corporate resides or has its principal office or its registered or head office out of Ontario but is

carrying on business in Ontario, a notice or document referred to in subsection (2) may be given to or served by serving any person carrying on the business in Ontario and in the case of an extra-provincial company, by serving the attorney for service in Ontario and such service may be by personal service or by registered mail at the address of the person or attorney.

Service by registered mail

(4) Service by registered mail is effected when the addressee actually receives the notice or document, or upon the expiry of six days after the day of registration, whichever is earlier. *New.*

Court documents

(5) Any notice or other document to be served on any person in relation to a proceeding in a court shall be served in accordance with the rules of the court and subsections (1) to (4) do not apply to any such notice.

COMMENTARY

1. *A number of provisions of the present Act require that a notice be given or served in certain circumstances (e.g., ss. 20(1), 55(3) and 59(5). The Committee recommends that the Draft Act include comprehensive rules, based on s. 67 of the Uniform Act, governing the service of notices and other documents. Subsection (1) deals with the service of a notice or other document: (a) on a secured party who has registered a financing statement or financing change statement; and (b) on a debtor by secured party. Subsection (2) specifies the means by which service may be effected on other persons not covered by subsection (1). Subsection (3) governs service on persons located outside of Ontario but carrying on business in the province. Subsection (4) deems service by registered mail to be effected upon actual receipt of the notice or the expiry of six days after the day of registration, whichever is the earlier. This rule will be particularly important for the purpose of ascertaining the fifteen-day period of notice of disposition under s. 63(4).*

2. *An exception to these rules is provided in the case where a person is served with a notice or other document in relation to a court proceeding. In these circumstances, subsection (5) provides that service shall be effected in accordance with the rules of the appropriate court.*

Knowledge and notice

69. For the purpose of this Act, a person knows or has notice or is notified when service is effected in accordance with section 68 or the regulations or when,

(a) in the case of an individual, information comes to his or her attention under circumstances in which a reasonable person would take cognizance of it;

(b) in the case of a partnership, information has come to the attention of one or more of the general partners or of a person having control or management of the partnership business under circumstances in which a reasonable person would take cognizance of it;

(c) in the case of a corporation, other than a municipal corporation or local board thereof, information has come to the attention of,

(i) a managing director or officer of the corporation, or

(ii) a senior employee of the corporation with responsibility for matters to which the information relates,

under circumstances in which a reasonable person would take cognizance of it. *New.*

COMMENTARY

This section, based on s. 68 of the Uniform Act, replaces the definition of "notify" in s. 1(p) of the present Act. The rules contained in this section will be helpful in determining when a person has knowledge or notice of certain information. For example, clause (c) could be applied to ascertain when a corporate secured party has learned of a transfer of collateral by a debtor for the purpose of s. 48(2) of the Draft Act.

Extension or abridgment of time

70. Where in this Act, other than in sections 5, 6, 7 and 12 and in Parts III and IV and in this Part, a time prescribed within which or before which any act or thing must be done, the District Court, on an application without notice to any other person, may extend or abridge the time for compliance on terms that the court considers just. *New.*

COMMENTARY

COMMENTARY

This section, based on s. 65 of the Uniform Act, replaces s. 64 of the present Act. A court is given the power to extend to abridge the time requirements in the Act, except where third parties have vested interests. For example, the section would apply to the time limits specified in ss. 11, 20 and Part V.

Destruction of books, etc.

71. The registrar may authorize the destruction of books, documents, records or paper, including those related to a prior law as defined in Part VII,

(a) that have been microfilmed; or

(b) that in the registrar's opinion need not be preserved any longer. R.S.O.1980,c.375, *s.68(1),amended.*

COMMENTARY

This section, which is concerned with the destruction of documents, is derived from s. 68(1) of the present Act. The registrar will have the power to authorize the destruction of documents registered under the "prior law". "Prior law" is defined by s. 75 of the Draft Act to include documents registered under the CSRA.

Removal of information from registration system

72. (1) The registrar may remove from the central file of the registration system information related to a financing statement or financing change statement,

(a) if the financing statement is no longer effective;

(b) upon the receipt of a financing change statement discharging the registration of a financing statement;

(c) upon receipt of a court order requiring the registrar to amend the information recorded in the central file to indicate the discharge of a financing statement or a financing change statement; and

(d) upon the final determination in a claim made under section 44 that a financing statement or financing change statement has been fraudulently registered. R.S.O.1980,c.375,s.68(2),*amended.*

Idem

(2) The registrar may remove from the central file of the registration system information related to a financing change statement if,

(a) it does not refer to the correct registration number of the financing statement or financing change statement to which it relates; or

(b) the requirements of the regulations related to setting out the name of the debtor have not been complied with. *New.*

COMMENTARY

1. *This section is derived from s. 68(2) of the present Act. The provision states the circumstances in which the registrar may remove from the central file information related to a registered financing statement or financing change statement. Under subsection (2) information may be removed when a financing change statement does not link up with a prior registration. This situation may occur because the financing change statement does not refer to the correct registration number of the prior registration to which it relates or it does not set out the correct debtor name.*

Conflict with other Acts

R.S.O.1980, c.87

73. Where there is conflict between a provision of this Act and a provision of the *Consumer Protection Act*, the provision of the *Consumer Protection Act* prevails and, where there is conflict between a provision of this Act and a provision of any general or special Act, other than the *Consumer Protection Act*, the provision of this Act prevails. R.S.O.1980,c.375,s.69.

COMMENTARY

This section corresponds to s. 69 of the present Act.

Regulations

74. The Lieutenant Governor in Council may make regulations,

(a) designating branch offices;

(b) prescribing the duties of the registrar and branch registrars;

(c) prescribing business hours for the offices of the registration system or any of them;

(d) respecting the registration system;

(e) requiring the payment of fees and prescribing the amounts thereof;

(f) prescribing the amount of any charge to which a secured party is entitled for any statement or copy provided pursuant to section 18;

(g) prescribing forms, the information to be contained in forms, the manner of recording the information and the persons who shall sign forms;

(h) requiring that the forms to be used shall be those provided or approved by the registrar;

(i) governing the time assigned to the registration of financing statements and financing change statements;

(j) prescribing abbreviations, expansions or symbols that may be used in a financing statement or financing change statement or in the recording or production of information by the registrar;

(k) fixing the address to which financing statements and financing change statements shall be addressed when tendered by mail for registration;

(l) providing for the approval by the registrar of the forms to be used for the purposes of this Act, and for the withdrawal by the registrar of any such approval;

(m) prescribing additional methods of serving notices and other writings for the purposes of section 68 and prescribing methods of serving notices and other writings on persons not referred to in section 68;

(n) prescribing the portion of the fees received under this Act that shall be paid into The Personal Property Security Assurance Fund;

(o) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act.
R.S.O.1980,c.375,s.70(1);1981,c.58,s.5(1),*amended*.

COMMENTARY

This section is derived from s. 70(1) of the present Act. Clauses 70(1)(b), (h), (ka) and (o) and s. 70(2) have been deleted because they are unnecessary. Clauses 74(f) and (m) have been added to the section to enable the making of regulations complementary to ss. 18 and 68 of the Draft Act.

PART VII

APPLICATION, TRANSITION, AMENDMENTS, REPEALS, COMMENCEMENT

Interpretation

75. In this Part, "prior law" means,

(a) the law related to a security agreement made before the 1st day of April, 1976 where the security agreement was one to which *The Assignment of Book Debts Act, The Bills of Sale and Chattel Mortgages Act* or *The Conditional Sales Act*, being chapters 33, 45 and 76, respectively, of the Revised Statutes of Ontario, 1970, applied;

(b) the law related to a security agreement made before the day this section comes into force where the security agreement was one to which the *Corporations Securities Registration Act*, being chapter 94 of the Revised Statutes of Ontario, 1980, applied. *New.*

COMMENTARY

This new provision sets out a definition of "prior law" for the purposes of Part VII (the transitional provisions). "Prior law" has been defined to include both the law related to security agreements made before April 1, 1976, to which the former registration statutes applied, and the law related to security agreements subject to the Corporation Securities Registration Act.

Application of Act

76. (1) Except as otherwise provided in this Part, this Act,

(a) applies,

(i) to every security agreement made on or after the day this section comes into force,

(ii) to every security agreement made after the 1st day of April, 1976 if the security agreement was one to which the *Personal Property Security Act*, being chapter 375 of the Revised Statutes of Ontario, 1980, applied immediately before the repeal of that Act; and

(b) does not apply to,

(i) a security agreement to which a prior law applied at the time of its making,

(ii) a lease for a term of more than one year made before the coming into force of this section which does not secure payment or performance of an obligation, and

(iii) a consignment made before the coming into force of this section which does not secure payment or performance of an obligation.

Saving

(2) This Act does not affect the rights acquired by any person from a judgment or order of any court given or made before the day this Act comes into force, or affect the outcome of any litigation commenced on or before that day. *New.*

COMMENTARY

1. *This section deals in a comprehensive manner with the application of the Draft Act to all the various types of agreements that come within the expanded definition of "security agreement". Under subclause 1(a)(ii) the Draft Act will apply to all security interests created*

under the present Act since it was proclaimed in force on April 1, 1976, except where legal proceedings have been commenced or a judgment has been given or an order made (see subsection (2)). It should be noted that all amendments to the present Act since 1976 have been made retroactive. It is easier and less confusing to have a uniform regime applicable to all PPSA security interests. No one will be prejudiced because most of the amendments in the Draft Act are clarificatory or remedial in nature.

2. *Clause (1)(b) specifies the types of agreements to which the Draft Act does not apply, viz: a security agreement which was subject to the prior law at the time of its making, except as provided in ss. 77 and 78. This rule is a continuation of the policy embodied in ss. 3(1)(c) and 65(1) of the present Act; leases for a term of more than one year and consignments which do not secure payment or performance of an obligation where the lease or consignment agreement was executed prior to the coming into force of the section. Since these agreements are not subject to the present Act, it would be unfair to give the Draft Act retroactive effect and require compliance with the perfection requirements of the new Act.*

3. *Subsection (2) provides that the Draft Act does not affect vested rights acquired by any person under a prior court order or judgment or any such rights that are subject to pending legal proceedings.*

Chattel mortgages, etc., under prior law

77. (1) Every security agreement to which the prior law as described in clause 75(a) applied at the time of its making continues to have such force and effect as if the Acts referred to in that clause had not been repealed if the security interest was covered by an unexpired registration under the *Personal Property Security Act*, being chapter 375 of the Revised Statutes of Ontario, 1980, immediately before the coming into force of this section.

Idem

(2) Where a security interest under a security agreement described in subsection (1) was not covered under an unexpired registration immediately before the coming into force of this section, the security interest may be perfected again by the registration of a financing statement.

Application of Part IV

(3) Part IV applies to the perfection, continuation of perfection and reperfection of a security interest under a security agreement to which subsection (1) or (2) applies.

Where certain changes have not been recorded

(4) Where before the coming into force of this section, a secured party under a security agreement to which the prior law as described in clause 75(a) applied at the time of its making failed to register a financing change statement after learning of the transfer of collateral and the information required to register a financing change statement or after learning of the change of name and the new name of the debtor, the secured party shall register a financing change statement recording the transfer or the new name of the debtor, as the case may be, within twenty-four months of the coming into force of this section.

Effect of failure to comply

(5) Where a secured party fails to register a financing change statement under subsection (4) by the end of the period referred to in that subsection, the security interest created by the security agreement shall be subordinate to the interest of any person without knowledge of the security interest who has subsequently acquired rights in the collateral and has relied upon a search made in the central file of the registration system in the name of the transferee or the changed name of the debtor, as the case may be. *New.*

COMMENTARY

1. *Subsections (1) and (2) carry forward the transitional rules included in ss. 65(1) and 66(1) of the present Act.*

2. *Subsection (3) is a new provision which clarifies that Part IV of the Act applies to the perfection and continuation of perfection of a security interest created by a pre-1976 security agreement to which the prior law as described in clause 75(a) applied at the time of its making (i.e., chattel mortgages, conditional sale contracts and assignments of book debts executed prior to April 1, 1976). The purpose of this rule is to ensure that the information in the registration system is kept up-to-date in the future. Since it is uncertain whether there is an obligation to record transfers by debtor or changes of debtor name under the present law where there is a registration related to these types of pre-1976 security agreements, it would be unfair to deem the security interests unperfected with respect to changes that had occurred prior to the coming into force of the Draft Act. Secured parties will be given a reasonable period of time to comply with this requirement.*

3. *Subsection (4) will permit a secured party to record a change of name or transfer by debtor that occurred prior to the coming into force of the section within twenty-four months after that date. Where there has been a failure to record the change of name or transfer by debtor by the end of the twenty-four month period, subsection (5) provides that the security interest will be subordinate to the interest of third parties who have subsequently acquired rights in the collateral and relied upon a search in the registration system made in the name of the transferee or the changed name of the debtor. See the parallel provisions in ss. 78(9) and (10) and the related commentary.*

Corporation securities

78. (1) A mortgage, charge or assignment, the registration of which was provided for in the *Corporation Securities Registration Act,* being chapter 94 of the Revised Statutes of Ontario, 1980, (referred to in this section as the former Act) that was registered under that Act before the coming into force of this section, continues to have such force and effect as if that Act had not been repealed and except as provided in this section and sections 43 and 44, this Act does not apply to any such mortgage, charge or assignment.

Idem

(2) Where a mortgage, charge or assignment, the registration of which was provided for in the former Act, was made before the coming into force of this section but was not registered under that Act,

(a) this Act shall be deemed always to have applied to the mortgage, charge or assignment; and

(b) the security interest created by the mortgage, charge or assignment may be perfected under this Act.

Entries in registration system

(3) The registrar shall, with respect to each mortgage, charge and assignment and each assignment thereof, registered under the former Act for which no certificate of discharge has been registered as of the day this section comes into force, enter into the central file of the registration system established for the purposes of this Act,

(a) the name of the debtor as shown in the registration under the former Act;

(b) the registration number under the former Act; and

(c) the following notation:

This registration was made under the *Corporation Securities Registration Act* (R.S.O.1980,c.94) before its repeal. A copy of the instrument is available for inspection in the offices of the Ministry of Consumer and Commercial Relations located at

.....

(address of appropriate office)

Discharged registrations

(4) Mortgages, charges and assignments, and assignments thereof, registered under the former Act for which a certificate of discharge has been registered before the coming into force of this section shall not be entered into the registration system established for the purposes of this Act.

Registration period

(5) A registration entered into the central file of the registration system under subsection (3) expires on the fiftieth anniversary of the coming into force of this section unless it is discharged or renewed in accordance with this section.

Renewal

(6) A registration entered into the central file of the registration system under subsection (3) may be renewed before the expiry of the fifty-year period referred to in subsection (5) by the registration of a financing change statement.

Idem

(7) Where a registration entered into the central file of the registration system under subsection (3) has expired, the registration may be renewed by the registration of a financing statement.

Idem

(8) The expiration date set out in the financing change statement registered under subsection (6) or a financing statement registered under subsection (7) shall not be a date later than the seventy-fifth anniversary of the date of registration of the financing change statement or financing statement.

Change of name of debtor

(9) Where before the coming into force of this section and after the original registration under the former Act the debtor changed its name and the secured party learned of the change before the coming into force of this section, the secured party shall register a financing change statement recording the change of name within twenty-four months of the coming into force of this section.

Effect of failure comply

(10) Where a secured party fails to register a financing change statement under subsection (9) by the end of the period referred to in that subsection, the security interest created by the mortgage, charge or assignment shall be subordinate to the interest of any person without knowledge of the security interest who has subsequently acquired rights in the collateral and has relied upon a search made in the central file of the registration system in the changed name of the debtor.

Discharge

(11) A secured party may discharge in whole or in part a mortgage, charge or assignment or any assignment thereof entered into the central file of the registration system under subsection (3) by the registration of a certificate of discharge in the prescribed form and, except in the case of a certificate of discharge executed by a corporation under its corporate seal, the certificate shall be accompanied by the affidavit of an attesting witness of the execution thereof.

Partial discharge

(12) Where a certificate of discharge partially discharges a registration entered into the central file of the registration system under subsection (3), it shall be accompanied by a financing change statement.

Order for discharge

(13) The debtor or any person having an interest in the collateral may make an application to the District Court for an order discharging or partially discharging a mortgage, charge or assignment or any assignment thereof entered into the central file of the registration system under subsection (3).

Idem

(14) Upon hearing an application made under subsection (13) and upon being satisfied that the security interest is released or partially released, the court may order,

(a) that the registration be discharged where the security interest has been released; or

(b) that a financing change statement be registered where the security interest is partially released.

Removal of information from registration system

(15) Upon receipt of,

(a) a certificate of discharge under subsection (11) that wholly discharges a registration entered into the central file of the registration system under subsection (3); or

(b) a certified copy of an order made under clause 14(a),

the registrar shall remove from the registration system information related to the registration.

Application of ss. 47-50

(16) Sections 47, 48, 49 and 50, except subsection 48(1) and clauses 48(2)(a) and (c), apply to the perfection, continuation of perfection and reperfection of a security interest under a mortgage, charge or assignment entered into the central file of the registration system under subsection (3).

Election re: enforcement of security agreements

(17) Where there is a default under a mortgage, charge or assignment entered into the central file of the registration system under subsection (3), the secured party may elect to enforce the security agreement in accordance with Part V by stating in the notice referred to in subsection 63(4) or 65(2) that the secured party has elected to be bound by Part V. *New.*

COMMENTARY

1. *This section contains comprehensive transitional rules governing corporation securities whose registration was provided for in the Corporation Securities Registration Act (CSRA). Under subsection (1) the old CSRA law continues to apply, except as provided in this section and ss. 43 and 44 (the latter two sections are concerned with the Assurance Fund). The CSRA will not apply, however, to corporation securities registered only under the present PPSA in accordance with s. 66a of the Act.*

2. *Subsection (2) is a remedial provision and corresponds to s. 66a of the present Act. Where a mortgage, charge or assignment subject to the CSRA was made prior to the coming into force of this section but not registered under that Act, the Draft Act will be deemed to apply to it and the security agreement may be perfected under the Draft Act.*

3. *Under subsection (3) the registrar of personal property security will be required to enter in the central file of the registration system a notice of each undischarged CSRA registration. Subsection (4) provides that no information shall be entered into the registration system relating to discharged CSRA registrations.*

4. *Subsections (5) to (8) deal with the registration period and renewal of a registration entered under subsection (3). Subsection (5) states that the registration will be effective for a period of fifty years unless it is discharged or renewed in accordance with the section. The secured party will be permitted to renew the registration at any time within the fifty-year period by the registration of a financing change statement under subsection (6). Where the registration has expired, it may subsequently be renewed by registration of a financing statement under subsection (7). Pursuant to subsection (8) the secured party may select an appropriate time period for the effectiveness of the renewal of the registration, which may not exceed seventy-five years.*

5. *The Committee recommends that CSRA registrants be required to record a change of debtor name which has occurred since the original registration under the CSRA and prior to this section coming into force where the secured party learned of the change of name prior to the coming into force of this section. The purpose of this new requirement is to ensure that the information in the registration system is up-to-date in order to protect third parties carrying out searches. Subsection (9) imposes an obligation on a secured party to record the change of name within twenty-four months of the coming into force of the section. The two-year period is necessary because of the large volume of CSRA registrations and the fact that trustees under trust indentures do not monitor the activities of a debtor corporation as closely as do other secured parties. Where there has been a failure to record the change of name by the end of the twenty-four month period, subsection (10) provides that the registration and the related mortgage, charge, or assignment will remain valid as between the parties, but the security interest will be subordinate to the interest of third parties who have subsequently acquired rights in the collateral and relied upon a search in the registration system made in the changed name of the debtor. If the secured party learns of the change of name after this section is in force, subsection (16) applies and the change of name will have to be recorded within the fifteen-day period set out in s. 48(2).*

6. *Subsections (11) to (15) deal with discharges, partial discharges and removal of information from the registration system. A discharge or partial discharge will be effected by the registration of a certificate of discharge in the prescribed form under subsection (11). The certificate of discharge must be accompanied by an affidavit of attesting witness unless the certificate is executed by a corporation under its seal. This requirement is based on the provisions of s. 9(2) of the CSRA. In the case of a partial discharge, subsection (12) requires that the certificate be accompanied by a financing change statement. The debtor or any person having an interest in the collateral will be permitted to apply under subsection (13) for a court order discharging the registration. Pursuant to subsection (14) the judge can order that the registration be discharged or that a financing change statement be registered where the security interest is partially released. The registrar will be obligated under subsection (15) to remove from the registration system information related to the registration upon receipt of a certificate of discharge or a certified copy of a court order made under subsection (14).*

7. *Subsection (16) provides that the provisions of Part IV related to the registration of assignments by secured party, change of debtor name, amendments and subordination of security interests will apply to the CSRA registrations registered under subsection (3). Transfers by debtor will not be required to be recorded as there was no such requirement under the prior law and it would be too onerous to now impose this duty.*

8. *Subsection (17) is a permissive provision which allows a CSRA registrant to elect to proceed under Part V of the Draft Act when there is default under the mortgage, charge or assignment. The secured party will make the election by including a statement to this effect in the notice of disposition given under s. 63(4) or the notice of intention to retain collateral served under s. 65(2).*

Saving, certain corporation securities

79. (1) A mortgage, charge or assignment the registration of which was provided for in the *Corporation Securities Registration Act,* being chapter 94 of the Revised Statutes of Ontario, 1980, shall not be invalid by reason only that it was not registered under that Act, if the security interest created by the mortgage, charge or assignment was perfected by registration in compliance with the *Personal Property Security Act,* being chapter 375 of the Revised Statutes of Ontario, 1980, and the said *Personal Property Security Act* shall be deemed to have applied to any such security interest from the time the security interest arose and upon the coming into force of this Act, this Act applies to the security interest. 1981,c.2,s.1,*amended.*

Saving

(2) Subsection (1) does not affect the rights acquired by any person from a judgment or order of any court given or made before the 14th day of June, 1981, or affect the outcome of any litigation commenced on or before the 27th day of April, 1981. 1981,c.2, s.2.

COMMENTARY

1. *Subsection (1) is derived from s. 66a of the present Act. Section 66a was originally enacted by s. 1 of the Personal Property Security Amendment Act, 1981, S.O. 1981, c.2.*
2. *Subsection (2) is derived from s. 2 of that Act.*

Saving, real property payments

80. Clause 3(1)(d) and section 36 do not apply so as to affect rights that have been determined by a judgment or order of any court given or made before the 11th day of December, 1981. 1981,c.58,s.3.

COMMENTARY

This section is derived from s. 3 of the Personal Property Security Amendment Act, 1981 (No. 2), S.O. 1981, c. 58.

Inspection of prior law documents

81. (1) Upon the request of any person and upon payment of the prescribed fee, a document registered under a prior law shall be provided for inspection unless the document has been destroyed.

Copies of documents

(2) Upon the request of any person and upon payment of the prescribed fee, a copy of a document registered under a prior law shall be provided unless the document has been destroyed. R.S.O.1980,c.375, s.66(2),*amended*.

COMMENTARY

1. *Subsection (1) is derived from s. 66(2) of the present Act.*
2. *Subsection (2) is a new provision which entitles a person to obtain a copy of a document registered under a prior law, including a mortgage, charge or assignment registered under the Corporation Securities Registration Act, unless the document has been destroyed.*

Priorities

82. The order of priorities between a security interest created under a prior law and any other security interest shall be determined by the prior law. *New*.

COMMENTARY

The present Act does not have a priority rule to resolve a dispute between a security interest created under the prior law and a PPSA security interest (see the definition of the term "prior law" in s. 75 of the Draft Act). This section, based on s. 64(2) of the Manitoba Act, provides that the priority shall be determined by the prior law. This rule is consistent with the policy of the present Act that the law applicable to pre-PPSA security interests (but only to such security interests) should be preserved so far as is reasonable.

83. Section 26 of the *Execution Act*, being chapter 146 of the Revised Statutes of Ontario, 1980, is repealed and the following substituted therefor:

Taking security interests in personal property in execution

R.S.O.1980, c.375

26. (1) Where an execution debtor is a secured party and the security interest is perfected by registration under the *Personal Property Security Act*, upon payment of the proper fees, a sheriff may seize the security interest by registering a financing change statement under that Act in the form prescribed thereunder recording the seizure of the security interest and the sheriff, after registering the financing change statement, may sell the execution debtor's security interest.

Effect of registration

(2) Upon the registration of the financing change statement referred to in subsection (1), the security interest of the execution debtor is bound by the execution, and the registration is notice of the execution and seizure to all persons who may thereafter acquire an interest in the security agreement or the property subject to the security interest and the rights of the sheriff and the execution creditor have priority over the rights of all persons who subsequently acquire an interest in the security agreement.

Service of notice on debtor

(3) The debtor under a security agreement is not affected by a seizure under this section unless a notice of the seizure has been served upon the debtor, and any payment made by the debtor under the security agreement to the secured party before such service shall be valid.

Payment to sheriff

(4) After the debtor has been served with a notice of seizure under subsection (3), the debtor shall pay to the sheriff all money then payable and, as it becomes due, all money that may become payable under the security agreement so far as may be necessary to satisfy the execution.

Payments made after notice

(5) Any payment made to the secured party after service of the notice of seizure under subsection (3) or after actual knowledge of the seizure is void as against the sheriff and the execution creditor.

When seizure no longer effective

R.S.O.1980, c.375

(6) Where a financing change statement has been registered under subsection (2) and the execution has expired or is satisfied, set aside or withdrawn, the sheriff shall register a financing change statement under the *Personal Property Security Act* in the form prescribed thereunder recording the fact that the seizure of the security interest is no longer effective.

Rights and remedies of sheriff

(7) In addition to the remedies provided in this Act, upon seizure of the security interest, the sheriff has all the rights and remedies of the execution debtor under the security agreement and the *Personal Property Security Act*, and the sheriff is entitled to a bond of indemnity sufficient to indemnify against all costs and expenses to be incurred by the sheriff in the enforcement of the security agreement.

Service of notice

1984,c.-

(8) Until the *Personal Property Security Act, 1984* comes into force, a notice under subsection (3) may be served in the manner set out in subsection 22(2).

Idem

(9) After the *Personal Property Security Act, 1984* comes into force, sections 68 and 69 of that Act apply with necessary modifications to notices under subsection (3).

COMMENTARY

1. *This section provides for the re-enactment of s. 26 of the Execution Act. The present s. 26 establishes procedures for the seizure of a chattel mortgagee's interest in a mortgage by the sheriff under a writ of execution. The revised s. 26 is based on a recommendation of the Ontario Law Reform Commission in its Report on the Enforcement of Judgment Debts.*

2. *Subsection 26(1) provides for the seizure and sale of all security interests in personal property where the secured party is the execution debtor. Under s. 26(2) the security interest is effectively bound by the execution upon registration by the sheriff of a financing change statement recording the seizure. Pursuant to s. 26(3) the debtor under the security*

agreement is not affected by a seizure unless notice of seizure is served upon him in accordance with ss. 26(8) or (9). After the debtor has been served with the notice of seizure, s. 26(4) provides that the debtor shall make all payments payable under the security agreement to the sheriff until the execution is satisfied. Any such payment made to the secured party will be void as against the sheriff and the execution creditor (see s. 26(5)).

3. *Where a security interest is seized and the execution is no longer in force, the sheriff is required to register a financing change statement under s. 26(6) recording the fact that the seizure is no longer effective. Once a security interest is seized, s. 26(7) states that the sheriff has all the rights and remedies of the execution debtor (the secured party) under the security agreement and the PPSA.*

Repeals

84. The following Acts are repealed:

1. The *Personal Property Security Act*, being chapter 375 of the Revised Statutes of Ontario, 1980.
2. The *Personal Property Security Amendment Act, 1981*, being chapter 2.
3. The *Personal Property Security Amendment Act, 1981 (No. 2)*, being chapter 58.
4. The *Corporation Securities Registration Act*, being chapter 94 of the Revised Statutes of Ontario, 1980.

COMMENTARY

This section is self-explanatory.

Commencement

85. This Act comes into force on a day to be named by proclamation of the Lieutenant Governor.

COMMENTARY

The Act will come into force on proclamation. A period of time is needed after Royal Assent to make all the necessary changes to the registration system required by the amendments included in the Draft Act (e.g., the development of new computer programmes and forms).

Short title

86. The short title of this Act is the *Personal Property Security Act, 1984*.

COMMENTARY

This section is self-explanatory.

APPENDIX I

TABLE OF CONCORDANCE:
Draft Personal Property Security Act to Personal Property Security Act, R.S.O. 1980, c. 375, as amended.

COMMITTEE DRAFT	PPSA, R.S.O. 1980, c. 375
1	1
1.	(a)
2.	...
3.	(c)
4.	(d)
5.	...
6.	(e)
7.	(f)
8.	(g)
9.	(h)
10.	(i)
11.	(j)
12.	...
13.	(k)
14.	(l)
15.	(m)
16.	(n)
17.	...
18.	...
19.	...
20.	...
21.	(q)
22.	(r)
23.	...
24.	(s)
25.	...
26.	(t)
27.	(u)
28.	(v)
29.	(w)
30.	(x)
31.	(y)
32.	...
33.	(z)

APPENDIX I

COMMITTEE DRAFT	PPSA, R.S.O. 1980, c. 375
2(1)	2
2(2)	...
3(1)(a)	3(1)(a)
3(1)(b)	3(1)(b)
3(1)(c)	3(1)(d)
3(1)(d)	3(1)(e)
3(1)(e)	2(b), in part
3(1)(f)	...
3(1)(g)	...
3(1)(h)	...
3(2)	3(2)
4	4, 47(5)
5(1)	6(1)
5(2)	7(1), (2)
5(3)	7(3)
5(4)	8
5(5)	6(2)
6	...
7(1)	5(2)
7(2)	...
7(3)	...
7(4)	...
7(5)	...
8	...
9	9
10	11
11(1), (2)	10, 12(1)
11(3)	12(2)
12	13

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14(1)	16
14(2)	...
15	17
16	18
17	19
18(1)	20(1)
18(2)	...
18(3)	...
18(4)	20(2)
18(5)	20(3)
18(6)	20(4)
18(7)	20(6)
18(8)	...
18(9)	...
18(10)	...
19	21
20(1)	22(1)
20(2)	22(2)
20(3)	22(3)
20(4)	...
21	23
22	24
23	...
24	26
25(1)	27(1)
25(2)	27(2)
25(3)	...
25(4)	...
25(5)	...

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27	29
28(1)	30(1)
28(2)	...
28(3)	30(2)
28(4)	30(3)
29	31(1)
30	32
31	33
32(1)	34(1)
32(2)	...
32(3)	34(2)
32(4)	34(3)
32(5)	...
33(1)	35(1)
33(2)	35(2)
33(3)	...
33(4)	...
33(5)	...
34(1)	36(1), (2)
34(2)	36(3)
34(3)	36(4)
34(5)	...
34(6)	...
34(7)	36(5)
35(1)	37(1)
35(2)	37(2)
35(3)	...
35(4)	37(3), in part
35(5)	37(3), in part
35(6)	...
35(7)	...
35(8)	37(4)
36	36a

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37	38
38	39
39(1)	40(1)
39(2)	40(2)
39(3)	...
40	41
41	42
42	43
43(1)	44(1)(a)
43(2)	44(1)(b)
43(3)	44(2)
43(4)	44(3)
44	45
45(1)	47(1)
45(2)	...
45(3)	47(2)
45(4)	...
46(1)	46
46(2)	...
46(3)	...
47	48
48(1)	49(1)
48(2)	49(2)
48(3)	...
48(4)	49(3)
49	50
50	51

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52	52
53	...
54	54
55	55(1)
56(1)	55(3)
56(2)	...
56(3)	...
56(4)	55(4)
56(5)	55(5)
57	...
58	...
59(1)	56(2)
59(2)	56(3)
59(3)	56(4)
59(4)	56(5), in part
59(5)	56(5), in part
59(6)	56(6)
59(7)	56(7)
59(8)	56(1)
60	...
61	57
62	58
63(1)	59(1)
63(2)	59(2)
63(3)	59(4)
63(4)	59(5), in part
63(5)	59(5), in part
63(6)	59(5), in part

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63(7)	59(7)
63(8)	59(8)
63(9)	59(9)
63(10)	59(10)
64(1), (2)	60
64(3)	...
64(4)	...
65	61
66(1)	62
66(2), (3)	...
67(1)	63(1)
67(2)	63(2)
67(3)	...
67(4)	63(3)
67(5)	63(4), (5)
68	...
69	...
70	...
71	68(1)
72(1)	68(2)
72(2)	...
73	69
74	70(1)
75	...
76	...
77	...
78	...
79	66a
80	...
81(1)	...
81(2)	66(2)
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85	...
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APPENDIX II

TABLE OF ABBREVIATIONS OF STATUTES
Referred to in this Report

CSRA	—	Corporation Securities Registration Act, R.S.O. 1980, c. 94
Draft Act	—	revised Personal Property Security Act recommended by the Minister's Advisory Committee
Manitoba Act	—	Manitoba Personal Property Security Act, S.M. 1973, c. P 35
OBCA	—	Business Corporations Act, 1982, S.O. 1982, c. 4
Present Act	—	Personal Property Security Act, R.S.O. 1980, c. 375, as amended by S.O. 1981, c. 2 and c. 58
Saskatchewan Act	—	Saskatchewan Personal Property Security Act, S.S. 1979-80, c. P-6.1
UCC	—	Article 9 of the American Uniform Commercial Code
Uniform Act	—	Uniform Personal Property Security Act, 1982, which has been jointly adopted by the Canadian Bar Association and the Uniform Law Conference of Canada